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Vertical Antitrust Enforcement: Transatlantic Perspectives on Restrictions of Online Distribution under EU and U.S. Competition Laws

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The opinions expressed, omissions and mistakes are, of course, solely my own.

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Abstract

This paper looks at how EU and U.S. competition laws deal with restrictions of online sales in distribution agreements, respectively. The growing importance of online commerce highlights how vertical competition law enforcement is still an important building block of competition law policies, both in the U.S. and in Europe.

Businesses who are either engaged in online activities or deal with online intermediaries in the U.S. and EU should be aware of the rules of the game, since vertical antitrust issues are generally subject to different principles on both sides of the Atlantic.

The European Commission recently adopted new competition rules that specifically target restrictions of online sales in distribution agreements, acknowledging the importance of e-commerce for consumers and its instrumental role in achieving the paramount goal of a single internal market in Europe.

Conversely, unlike in the EU, several factors, such as the existence of a developed online market, the absence of single market considerations, the paramount importance of freedom to contract and the role of inter-brand competition under U.S. antitrust law, arguably explain why U.S. antitrust doctrine is less concerned about the need to adopt specific rules applicable to restrictions of online sales.

Table of Content

Introduction and Outline

"There are two kinds of business models: those that have been disrupted by technology, and those that have yet to be. Any business model that can be disrupted by technology will be, and probably should be."
D. Tapscott, The Wall Street Journal, 29 June 2011

About 15 years ago, Bill Gates imagined that the internet would help achieve "friction free capitalism" by putting buyer and seller in direct contact and providing more information to both about each other.

Back then, Amazon and eBay had only recently been established and were largely unknown outside of the U.S., and Google and social media companies were not even in an embryonic phase. Still, the potential of the internet and e-commerce was crystal clear, at least to some pioneers. With the benefit of hindsight, this fact is now clear to many others.

The emergence of the internet, as a new channel of distribution, represents a terrific innovation in the way goods can be promoted and purchased. Taking advantage of constant interaction with their users, companies operating online can easily and quickly adapt their offers to users' behavior and needs. Internet users, on the other hand, can easily and cheaply cherry-pick the best offer for the items they like.

Companies like Amazon, eBay, Google and Facebook almost exclusively rely on business models that provide direct contact between customers and users, bypassing layers of middlemen. Traditional businesses are split, as many are still somewhat afraid to adapt. Changes of this magnitude inevitably generate tensions between suppliers and distributors, as well as among competing distributors, particularly when margins to share are thin. When mail-order, telephone sales or supermarkets were first introduced, traditional retailers expressed fears that doomsday was looming. Like previous retail innovations, e-commerce will lead to a rebalancing of powers in the supply chain, and, predictably, skies will not fall this time too.

Sooner or later, market players will be forced to adapt to the new context; however, some of them may be tempted to engage in anti-competitive practices to limit online distribution of products for the sake of defending their market positions.

As history repeats itself, the new battleground in the suppliers-dealers relations is indeed the restriction of online sales in distribution agreements. This is an area of competition law that raises familiar questions in a fast-moving and still largely developing context.

The objective of this paper, which is structured in two main parts, is to look at how EU and U.S. competition laws deal with restrictions of online sales in distribution agreements. Part One encompasses a brief overview of general concepts of online distribution and touches upon jurisdictional issues that can be of interest for online businesses. Part Two, in turn, focuses on EU and U.S. competition rules and principles that apply to vertical online restraints in the distribution of products.

In essence, vertical antitrust issues are generally subject to different principles on both continents, yet EU and U.S. competition law share the same objective: to improve consumer welfare and enhance competitive market conditions. Specifically, online sales restrictions are treated differently, such that businesses who are either engaged in online activities or deal with online intermediaries in the U.S. and EU should be aware of the rules of the game.

The European Commission acknowledged the importance of e-commerce for consumers and its instrumental role in achieving the paramount goal of a single internal market in Europe by recently adopting new competition rules that specifically target restrictions of online sales in distribution agreements, insofar as such restrictions may raise artificial barriers that partition the internal market to the detriment of consumers.

Conversely, U.S. antitrust vertical enforcement chiefly relies on the set of rules rooted in the Sherman Act of 1890 and the principles developed by U.S. courts. Offline and online distribution channels are subject to the same rules. Unlike in the EU, several factors, such as the existence of a developed online market, the absence of single market considerations and the fundamental role of inter-brand competition, arguably explain why U.S. antitrust doctrine is less concerned about the need to adopt specific rules applicable to restrictions of online sales.

1. “Economics” of Online Distribution

“Consumption is the sole end and purpose of all production; and the interest of the producer ought to be attended to, only so far as it may be necessary for promoting that of the consumer.”
Adam Smith, *The Wealth of Nations* (London, 1776)

The present section provides a brief overview of the distinguishing traits of online distribution in order to understand the implications for the legal analysis of antitrust issues. The assessment of competition law issues generally requires taking into account a wide range of complex factual, economic and legal factors pertaining to the context within which such issues arise. The rapidly and constantly changing environment of online distribution makes this exercise as difficult as taking a neat photo of a cruising rocket.

Since its first appearance in the mid-nineties, e-commerce itself has gone through changes owing to constant developments of internet technology and the ability of individuals to access high-speed broadband from home, work and, ultimately, even mobile platforms.

Traditional retail has seen many changes over the years, including several significant ones, but e-commerce is probably bringing about unprecedented structural changes in established marketing and distribution practices that will likely result in a fundamental reorganization of how products are marketed and purchased. As it happens, some industries may be more vulnerable than others, but most likely no sector can be considered immune.

Today, consumers expect to be able to take advantage of modern distribution channels, which includes the ability to find the best deals online for any given product category. The impressive growth of internet shopping confirms that this is the way forward in the U.S. and in Europe. In 1993, e-commerce sales accounted for only US$ 3 billion in the United States, and much less in Europe. Recent reports highlight that U.S. online retail experienced a 12.6% year-over-year growth in 2010, with an expected 10% compound annual growth rate from 2010 to

2015; this means that sales should grow from US$ 176 billion in 2010 to nearly $US 250 billion by 2015.[1] Similarly, European online retail sales grew by 18% from 2009 to 2010 and will grow from US$ 112 billion in 2010 to US$ 184.6 billion by 2015.[2]

In reality, actual figures will likely beat these estimates.

A. *Some Distinguishing Features of Online Distribution*

Online commerce is different in many fundamental ways from traditional brick-and-mortar retailing as well as from other types of modern distribution channels. The borderless nature of the internet and its intrinsic characteristics, which includes the pervasive role of new technologies and revolutionary business models for marketing and distribution, are reshaping both established relationships in the distribution chain as well as consumer habits.

It would be naïve to say that e-commerce simply represents an additional distribution or marketing channel, no different than telephone, mail or catalog order channels.

Due to its unique characteristics, online commerce provides companies with a platform to better promote products and increase sales, while, at the same time, it also benefits consumers by providing an increased choice of sellers and products and a convenient channel to make purchases.

A.1 *What Online Commerce Means for Consumers*

Traditional retail requires buyers to visit several shops in order to compare products and

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[1] *See* Sucharita Mulpuru, *US Online Retail Forecast, 2010 To 2015*, FORRESTER RESEARCH, (Feb. 28, 2011) [hereinafter FORRESTER RESEARCH], *available at* http://www.forrester.com/rb/Research/us_online_retail_forecast%2C_2010_to_2015/q/id/58596/t/2. According to Forrester, a far larger portion of offline sales, about US$ 917 billion, was influenced by online research services. Forrester also estimates that online and web-influenced offline sales together accounted for 42% of total retail sales and that that percentage figure will grow to 53% by 2014, when the web will be influencing US$ 1.4 billion worth of in-store sales.

[2] *See* FORRESTER RESEARCH, *supra* note 1. European consumers continue to embrace the online channel as an adjunct to other channels as they identify and decide upon the products they wish to buy, creating an increasingly multichannel retail environment in Europe. Europe’s double-digit growth rate, considerably higher than the US growth rate, reflects the fact that most Western European countries’ online retail sales are still relatively immature.

prices, explore products' characteristics and so forth, before they eventually make a purchase. Brick-and-mortar shops are subject to opening hours' limitations, and consumers are normally constrained by both the number of shops they can visit in their neighborhood or city as well as the limited time they can dedicate to shopping. What is more, it may also be the case that a given product is not readily available in certain shops. Also, price-sensitive shoppers may not be aware, and therefore cannot take advantage, of ongoing promotional sales.

No longer than two decades ago, someone wanting to buy a first edition of a James Bond book could spend weeks scouring specialist shops or placing advertisements in collectors' magazines. If he wanted to buy a flight, he could visit or call his local travel agent and wait to receive the tickets in the mail or collect them in person. If he wanted to buy a former hit song, he could travel to the nearest record shop and hunt for it, or he could order it and pick it up some time later.

Today, without moving from his sofa, the same person might find and buy the entire collection of 007 books in minutes, possibly in another country. Within the same hour he could have compared flight prices and times from many providers and bought, and already received, his "electronic ticket." He could then click on a music download site and listen to his favorite song in the same time that it would have taken to get ready to go to the shops.

Convenience, Wider Consumer Choice. Consumer choice is greatly enhanced in terms of sellers and products to choose from as a result of e-commerce. It is commonly recognized that the ability and convenience to shop at any time from home, office or via mobile devices is a key feature of e-commerce. Due to the borderless nature of e-commerce, people, even those living in remote locations, can visit merchants' websites, like virtual stores, from the comfort of their homes and eventually conclude a transaction in front of the computer without the problem of opening hours, distance from shops or availability of goods.

Increased Information Availability, Lower Prices. Search engines and price comparison sites allow consumers to easily find and compare many different offers for the same product in a click, thereby reducing search costs. It is common today to find significantly more product information on the internet than by visiting a shop. Due to such increased price transparency and information availability, consumers can more easily compare many products and prices and select the best deal for them.

Convergence of Social, Local, and Mobile. A common criticism used to be that e-commerce lacks social interaction, as the primary relationship is not between the seller and the buyer, but rather between the buyer and the mediated environment.3 While that is still true, online shopping has increasingly become a social phenomenon, as online shoppers are often given the ability to leave or share feedback about past purchases or about a product's characteristics more generally. Such feedback clearly provides added value information that traditional retailers cannot offer unless they have some form of web presence. Increasingly, consumers find product information and suggestions on social networks. This phenomenon, in turn, has huge network effects to attract new potential customers.4 The advent of mobile devices, along with the development of advertising technology that allows for consumer targeting on the basis of location, is indirectly revitalizing the brick-and-mortar shopping experience. Savvy

[3] A research study on online shopping has found that online buyers generally like the relative lack of social interaction for several reasons, including the fact that sales people are often perceived to be unhelpful or uniformed, and they often pressure or obligate buyers. *See* Mary Wolfinbarger & Mary C. Gilly, *Shopping Online for Freedom, Control and Fun*, 43 CAL. MANAGEMENT REV. 73, 73-93 (Winter 2001).

[4] On the other hand, lower search and switching costs (i.e. the ability for buyers to easily purchase the same product by multiple sellers simply based on the best price they can get) make it more difficult for online businesses to retain customers than is the case for traditional retailers. *See* Michael Trusov, Randolph E. Bucklin, & Koen H. Pauwels, *Effects of Word-of-Mouth versus Traditional Marketing: Findings from an Internet Social Networking Site*, in ROBERT H. SMITH SCHOOL RESEARCH PAPERS NO. RHS 06-065, (Apr. 24, 2008), *available at* http://ssrn.com/abstract=1129351.

retailers have started using check-in services, coupon services, social tools and the ability to buy from mobile devices (or just online) and collect at the shop ("click and collect") to drive foot traffic and perhaps encourage customers to make additional in-store purchases.

A.2 *What Online Commerce Means for Businesses*

Manufacturers used to sell their merchandise through complex and rather costly distribution networks of brick-and-mortar shops to reach as many customers as possible; traditionally, they sold to intermediaries who would, in turn, resell the goods to consumers. Physical shops entail fixed costs that may be quite significant depending, for instance, on location, shop space, number of staff and stock requirements. Advertising campaigns can be an expensive investment and not necessarily the most effective method to entice consumers to make purchases.

Internet technology is at the center of this retailing revolution. E-commerce significantly decreases barriers to entry for online retailers due to low start-up costs relative to traditional retailers; for the most part, online businesses have no, or very low, logistics and stock costs. This is probably not new, since most cost-reducing innovations in retailing have been embodied in new retailing formats.[5] The most significant effect that the growing penetration of e-commerce has had on traditional forms of retailing, then, is the alteration to the balance of power between different levels of the distribution chain; marketing and distribution are more direct in e-commerce, which bypasses, in some instances, several layers of intermediaries. As a result,

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[5] Joseph Palamountain termed the rivalry between different types of retailers "intertype competition." *See* JOSEPH C. PALAMOUNTAIN, JR., THE POLITICS OF DISTRIBUTION (Greenwood Press 1968). For Joseph Schumpeter, instead, the process of "Creative Destruction" involved competition from "the new type organization ... competition which commands a decisive cost or quality advantage" that strikes terror into the heart of existing firms. Schumpeter understood that Creative Destruction was not confined to the manufacturing level. In the "retail trade, the competition that matters arises not from additional shops of the same type, but from the department store, the chain store, the mail order house and the supermarket." Schumpeter would probably have included the internet and e-commerce if he could have witnessed their impact on retail. *See* JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY, (Harper Perennial Modern Classics, 2d ed. 1947).

businesses can avoid being overstocked or understocked, both of which are costly, and simply focus more accurately on buyer needs; they can even rapidly change their offers thanks to the direct interaction with potential buyers made possible by advertising technologies.

New Business Models

Deeper information availability and the relatively low cost of setting up an online business have allowed new business models to flourish. To simplify somewhat, the three common business models in the online space today are: "pure internet play," "bricks-and-clicks," and sales via "third party platforms."[6]

Pure Internet Play. This business model is internet focused, because it relies solely on the internet as a distribution channel. It is characterized by lower fixed costs compared to traditional stores, notably because of lower staff, infrastructure and inventory costs than offline retailers.[7] However, pure play retailers need to commit significant investments in such items as advertising, web design, or security technologies, in order to establish strong brand reputation. This is necessary to overcome a major problem in the online environment: winning customers over the competition (either online or offline) and, importantly, retaining customers' loyalty.

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[6] When e-commerce first appeared, traditional retailers established some sort of internet presence where buyers could browse their digitized mail-order catalogues and eventually make purchases. In its core, in fact, the first generation of online merchants adapted the mail-order model to the internet, the only difference being that consumers could complete the whole transaction, including payment, online rather than by mail. Business websites that were used solely for promotion and communication, while the actual commercial transaction is carried out through traditional channels (on-premise, telephone, fax, etc.), are not, strictly speaking, e-commerce websites. *See* Judith A. Chevalier, Professor of Economics and Finance, Yale Univ. Sch. of Mgmt., Written Statement to the Federal Trade Commission Public Workshop on Possible Anticompetitive Efforts to Restrict Competition on the Internet: Free Rider Issues and Internet Retailing (Oct. 10, 2002) [hereinafter Chevalier], *available at* http://www.ftc.gov/opp/ecommerce/anti-competitive/panel/chevalier.pdf.

[7] The evolution of online commerce shows that winning businesses require adapting strategies. Amazon was initially a pure online bookstore, but, in time, it extended its offerings to hundreds of goods. Over time, Amazon started building warehouses and developed a greater physical presence. While building warehouses may not seem like the best business decision for a firm trying to leverage the benefits of the internet, Amazon.com has realized the value of physical facilities. One benefit is that Amazon can now provide better customer service. For example, they can now ship a product to customers more quickly, because Amazon is likely to have ownership of the product without relying on another firm upstream in the supply chain for fulfillment. Furthermore, Amazon is able to take advantage of volume discounts it receives from wholesalers by buying a larger quantity at one time and warehousing the inventory that is not immediately sold.

Brick and Click. An increasingly popular business model is the "mix play" or "brick and click." The diffusion of e-commerce to a mass audience coupled with the recognition that it takes more than a good website to promote internet sales have given physical retailers a push towards adopting the internet. This retailing format has competitive advantages over pure play. For instance, physical retailers have an established "offline brand" to attract customers who may be concerned about shopping online. In addition, they have a network of physical outlets where buyers can pick up goods that they may have ordered online. In fact, the mix play is the natural evolution for certain traditional retailers who have extensive logistics and supply chains but realize that the online channel cannot be disregarded. The downside of this business model is the risk of "cannibalization" of offline sales vis-à-vis the online channel.

Third Party Platforms. The use of third party platforms, such as electronic market places or online auction sites, is a further way of selling products online. Third party platforms offer businesses a ready-to-use environment to potentially reach many more customers than a single retailer would alone. In this way, small sellers may enjoy the benefit of selling under the umbrella of a well-known platform, despite not having a strong brand on their own. This is a relatively low cost way for new retailers to enter the market, as they only need to list and describe their products on the platform's directory. In some instances, online service providers team up with traditional brand partners and offer them upgraded turn-key online solutions, including mono-brand online platforms, interface design, global logistics, payment systems, customer care, and international web marketing etc.[8]

[8] *See, e.g.*, Yoox Group Company Profile, http://www.yooxgroup.com/en/company_profile/the_group.asp. Others may resort to slightly different types of services, like "mirror websites" (or co-branded websites), to continue their e-presence and avoid losses or high costs associated with website maintenance. An example of co-branded websites was the cooperation between Amazon.com and Borders.com (now terminated and subject to an antitrust dispute). Borders had previously, and unsuccessfully, attempted to operate its own website. Under the agreement, Borders'

The Role(s) of Intermediaries

A peculiar trait of online business models is that the line between manufacturers and distributors, and everything in between, is blurring to the point that, in principle, the distribution chain can be very short, with perhaps no, or very few, intermediaries between manufacturers and buyers.[9] It was initially believed that the internet would lead to what has become known as the "electronic brokerage effect,"[10] which is the dis-intermediation and collapse of intermediary firms that would result from the fact that consumers would increasingly serve themselves online to get the best deals and, in particular, lower prices. However, this has not happened, or at least not to that magnitude. While in some economic sectors traditional intermediaries have shrunken considerably, like tickets agents, other intermediaries have emerged to perform other services that facilitate and support sales.[11]

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website directed shoppers to what is known as a mirror website, a site hosted by Amazon. The books purchased through the mirror site were sold and shipped by Amazon, and Borders received a commission for each book sold. Amazon provided the inventory listing, website content, customer service, sales, and so forth, to Borders. Amazon selected the books offered, their prices, and the terms of sale. In the eyes of customers, Amazon was the actual seller of the books sold through this agreement and could retain the profits from these transactions. The agreement enabled Borders to tap the online market, while, at the same time, it allowed Amazon to expand its customer base to include customers loyal to the Borders brand. As part of the agreement, Borders abandoned its direct participation in the online market and agreed that it would not reenter the market during the term of the agreement. Eventually, Borders filed for bankruptcy protection and submitted a liquidation plan in July 2011. Borders' liquidation marks the first large casualty in the book industry since Amazon entered the business. *See* Mike Spector and Jeffrey A. Trachtenberg, *Borders Succumbs to Digital Era Books*, WALL ST. J., (July 20, 2011), *available at* http://online.wsj.com/article/SB10001424052702304567604576456430727129532.html?mod=WSJEurope_hps_MIDDLE_Video_Top.

[9] For instance, Dell's direct distribution model for customized computers shows that e-commerce may function without intermediaries, and may even threaten the existence of intermediaries in traditional commerce, at least in some cases. This tension may be exacerbated by the fact that e-commerce enables consumers (as well as suppliers) to gain access to information about such things as products and customer preferences directly, quickly and at little cost. *See* European Commission Report, *Competition Assessment of Vertical Mergers and Vertical Agreements in the New Economy*, 69-72 (Nov. 2001), *available at* http://ec.europa.eu/enterprise/newsroom/cf/_getdocument.cfm?doc_id=426.

[10] Thomas W. Malone, Joanne Yates, & Robert J. Benjamin, *Electronic Markets and Electronic Hierarchies*, 30 COMM. OF THE ACM 6 (June 1987); *see also* S. Ethiraj, I. Guler, & H. Singh, *The Impact of Internet and Electronic Technologies on Firms and its Implications for Competitive Advantage*, KNOWLEDGE @ WHARTON (2002).

[11] From a legal point of view, the fact that the network role is modified, insofar as it does not function as a distribution channel but supports all the secondary performances in the product's sale, does not change the nature of the relationship between the supplier and his channel partners (i.e. the former "distributors"). This is particularly relevant when the supplier has established selective or exclusive distribution networks. In other words, secondary services are also subject to the competition rules in the same way as the distribution activities.

Some traditional intermediaries have adapted to the new environment by offering services that justify their presence, like in a traditional distribution chain. As an example, distributor Ingram Micro redefined itself as an e-commerce services company.[12] It now provides order-management and fulfillment services for some of the biggest consumer-electronics vendors on the internet, such as Dell and Buy.com, and charges manufacturers a transaction fee rather than taking ownership of inventory and marking it up for sale to retailers. Ingram Micro also helps manufacturers sell directly to consumers by providing integration services that tie customers' order-processing systems into its warehouse-management systems. It also handles key online logistics, such as returns.[13]

But the role of intermediaries is not limited to the distribution and supply of products. More generally, new types of intermediaries tend to emerge when the pre-sale or post-sale services they provide: i) add value to the transaction, ii) lower transaction costs, and iii) eventually increase consumer confidence in buying online.[14] New intermediaries include, for instance, supply and demand aggregators, price comparison sites, marketplace exchanges, search engines, advertising networks, and social networking sites, to name a few.[15]

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[12] *See* Ingram Micro Logistics, http://www.ingrammicro.com/ext/0,,23358_21911_23845_21943,00.html#overview.

[13] *See* Elie Ofek, Zsolt Katona, & Miklos Sarvary, *Bricks and Clicks: The Impact of Product Returns on the Strategies of Multichannel Retailers*, 30 MARKETING SCIENCE 1, 42-60 (Jan.-Feb. 2011), *available at* www.cs.bme.hu/~zskatona/pdf/bricksclicks.pdf.

[14] Besides, many manufacturers may just prefer focusing on what they do best, namely R&D and production, rather than venturing into burdensome distribution and retail activities. In fact, not all manufacturers like to sell directly to end-consumers. There are several reasons for this. First, intermediaries like eBay and Amazon are used heavily by consumers, and as a result, companies need to offer their products through the channels that consumers use. Second, companies are concerned and uncertain about the true costs associated with delivering the product, and this uncertainty can be reduced by using intermediaries. Third, SMEs may save significant resources using intermediary services, because they then do not have to maintain websites. Additionally, small companies that sell through their own website are likely to have less traffic coming to and from the site than intermediaries do. As a result, consumers are more likely to find the individual company's products if they are sold through intermediaries. In addition, businesses and brands benefit from the consumer feedback and the review services that are provided by intermediaries.

[15] *See* Y. Bakos, *The Emerging Role of Electronic Marketplaces on the Internet*, 41 COMM. OF THE ACM 8 (Aug. 1998).

Supply & Demand Aggregators. The intermediary can aggregate transactions in order to benefit from economies of scale or scope. Intermediaries may aggregate either the demand or the offer of a good. An increasingly popular demand aggregator is, for instance, Groupon.[16] Consumers sign up to receive offers from local firms by e-mail each day at discounts of up to 90%. If a certain number of people sign up for the offer, then the deal becomes available to all; if the predetermined minimum is not met, no one gets the deal that day. This reduces risk for retailers, allowing them to treat the coupons as quantity discounts as well as sales promotion tools. On the supply side, aggregating the offer mainly consists of providing a one-stop-shop where buyers can purchase products from different producers, such as department stores, consumer electronic chains or supermarkets with an online presence. However, buyers may take advantage of lower shipment costs or other forms of discounts.

Online Marketplaces. One of the hurdles that online sellers need to overcome in order to attract customers is to establish a good brand reputation and trust among internet users. This is particularly the case for small sellers. Many buyers may simply not be aware of the existence of certain sellers, or they may not trust them. The same concern may play for a seller vis-à-vis potential customers. This information asymmetry may be partially overcome by the role of E-malls and online marketplaces. E-malls are very similar to traditional shopping malls; they bring together sellers of different products under the umbrella of a single website, often providing additional services such as product delivery and credit facilities for customers.[17] Online marketplaces are secure sites where trading partners can post sales offers or procurement orders,

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[16] *Online-coupon firms - Groupon anxiety: The online-coupon firm will have to move fast to retain its impressive lead*, THE ECONOMIST, Mar. 17, 2001.

[17] *See* R. Cooper & K. Michael, *The Structure and Components of E-mall Business Models*, *in* COLLABORATIVE ELECTRONIC COMMERCE TECH. AND RESEARCH LATAM (2005), *available at* http://ro.uow.edu.au/infopapers/378. For instance, PriceMinister.com (www.priceminister.com) acts as a trusted third party between buyers and sellers and guarantees that transactions are carried out quickly, securely and trouble-free.

which often incorporate dynamic pricing mechanisms, such as auctions, reverse auctions and exchanges.

Search Engines, Prices Comparison Platforms and Social Networks. Search engines and price comparison sites are potentially valuable facilitators of information that, if used effectively, can enable people to compare many products and prices and select the best deal for them.[18] More importantly, these intermediaries bring buyers and sellers closer to a deal. They behave like comparison-shopping engines, which search for sites selling a specified product and retrieve product specification and price, allowing users to immediately compare offers from different sellers. Often, they provide more objective information (e.g. consumer comments and feedback) than the sellers themselves. The information on the various products offered on the market is generally accompanied by an easy access to the product in question, which can be purchased on the intermediary website (e.g. in the travel industry, intermediaries like opodo.com or expedia.com). Search-based advertising platforms, like Google, are a very important type of intermediary in the online space and are similar to other transaction platforms that seek to match buyers with sellers and consummate trades.[19] Consumers are increasingly relying on social

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[18] However, according to a study published by the European Parliament, consumers may rationally choose to stop searching, even if they have not considered all available information, because the search costs involved makes it too costly, or consumers may limit search effort due to the large amounts of information available online; instead, consumers may rationally apply a rule-of-thumb decision-making process as suggested by the behavioral economics literature on cognitive limitations. *See* Research Study, *Consumer Behavior in the Digital Environment*, LONDON ECON. AND QUEEN MARY U. OF LONDON (2011), *available at* http://www.europarl.europa.eu/document/activities/cont/201108/20110825ATT25258/20110825ATT25258EN.pdf.

[19] Google generated nearly $30 billion in total ad revenue in 2010, largely from its AdWords system. AdWords helped revolutionize online advertising, offering marketers the chance to bid to display their ads when people searched for certain keywords on the Google search engine. The AdWords referencing service enables any economic operator, by means of the reservation of one or more keywords, to obtain the placing, in the event that one or more of those words corresponds to that/those entered as a request in the search engine by an internet user, of an advertising link to its site. That advertising link appears under the heading "sponsored links," which is displayed either on the right-hand side of the screen, to the right of the natural results, or on the upper part of the screen, above the natural results. Google also introduced a new service, called Google Commerce Search, allowing online and multi-channel retailers to take advantage of the features of its Google search technology on their trade websites, like on Google.com. *See* Video on Google Commerce Search,

networks, like Facebook, to find and share information about products that they later buy on the high street.

The Role of Online Advertising

In terms of potential sales growth, the real difference between online distribution and traditional retail lies in the internet environment itself and the modern tools and technologies related to it, like online advertising. The unique features of online advertising include the use of internet-based technologies and data collection mechanisms to target and track specific individuals (e.g. their shopping and web browsing behavior) and to automate the buying and selling of advertising inventory.[20]

Online advertising, in its various types and formats, may be considered the "killer application" in the hands of e-commerce businesses.[21] The reason for this phenomenon is that online advertising offers the solution to a problem that traditional retailers have: how to shorten the gap between advertising and the purchase, especially when a potential buyer is searching actively and, therefore, is "close" to the buying act.[22]

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http://www.google.com/commercesearch/gcs_features_video2.html.

[20] *See* David S. Evans, *The Economics of the Online Advertising Industry*, 7 R. OF NETWORK ECON. 3, (Sept. 2008), *available at* http://ssrn.com/abstract=1086473; *see also* UK Office of Fair Trading, *Online Targeting of Advertising and Pricing*, OFT 1231 (May 2010), http://www.oft.gov.uk/OFTwork/markets-work/completed/online-targeting; French Autorité de la Concurrence, *Sector Inquiry on the functioning of the online advertising market*, (Dec. 14, 2010), http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=368&id_article=1514.

[21] It is possible to distinguish various advertising formats: *Textual links or search-related advertisement*, namely sponsored links or commercial links that appear on search results pages alongside the so-called "natural search results" when an internet user performs a search using a search engine; *Display advertising* that appears on non-search web pages and is presented in the form of banners, images or videos; *Classified listings* that appear on web sites; and online advertisements that are "*e-mailed*" to individuals, though they are becoming less common and, to the extent that they are still sent, tend to be blocked by spam filters and similar technologies.

[22] *See, e.g.*, Decision No. ME/4912/11, Merger Clearance, Google/BeatThatQuote, ¶ 24 (U.K. Office of Fair Trading Aug. 11, 2011), http://www.oft.gov.uk/shared_oft/mergers_ea02/2011/Google-BeatThatQuote.pdf (Online advertising provides a more focused route for reaching customers. This allows firms to target their advertising close to the point and time of purchase. It also facilitates better measurement of the efficacy of campaigns, such that these could be quickly and effectively re-targeted to improve returns on advertising.). Search engines and online retailers have complained about Google's practices relating to unpaid search services. Last November 2010, following complaints from search engines Foundem, eJustice and Ciao!, the European Commission started an antitrust investigation into Google's alleged abuse of dominance in the online search market, in particular to ascertain whether Google altered its search algorithms to promote its own services over those of its rivals. *See* Press Release,

Other types of advertising in other media, such as broadcast (TV or radio) and print advertising, can, at best, persuade consumers to make a purchase, which eventually reinforces earlier advertising. But no matter how successful, the consumer usually cannot act on it right away and make a purchase, and, as time goes by, the consumer may eventually abandon the idea or "impulse" to buy or may simply further consider whether to purchase a competing product. Internet advertising bridges this gap, such that, when viewing an ad on a search engine like Google or Yahoo!, or on a third party web page, consumers have the opportunity to follow a link directly to a website where they can finalize the purchase.[23] Potential buyers can in fact make a purchase immediately after they have found the desired item. To overstate this somewhat, the act of buying certain goods online can be "impulsive," like buying an ice-cream or a soda at the supermarket counter. Traditional advertising cannot achieve the same result.

The difference with "old media ads" is even more striking when one considers that the internet also allows detailed information to be collected about consumers, such that the advertising shown may vary according to each consumer viewing a given webpage.[24] Tracking shopping habits and gathering web browsing behavior allows sellers to target potential customers

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European Commission, Antitrust: Commission Probes Allegations of Antitrust Violations by Google (Nov. 30, 2010),
http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1624&format=HTML&aged=0&language=EN&guiLanguage=en. Google is also being investigated by the U.S. Congress on similar grounds.

[23] A recent development is the integration of internet technology with real-time shopping in stores, using internet-capable phones, that allows consumers to compare offers while on-site and occasionally access discount coupons online for use at the checkout counter.

[24] Online advertisement can also be distinguished in behavioral and contextual advertising. Behavioral advertising is online advertising in which the advertisements are chosen according to the internet user's behavior while browsing on the internet, i.e. according to the sites that have been visited. The advertising is supposed to align with the user's presumed expectations based on this person's browsing, the content of web pages visited or the geographical location of the internet user. Most behavioral advertising works on the basis of small "cookie" files that are placed on a computer and used to track the pages a user visits on the site or on sites that are members of the same advertising network. Users are profiled on the basis of this browsing behavior and advertisements are targeted according to their likely interests. Conversely, contextual advertising is based on the content of the page seen by the internet user, in order to propose an advertisement that seems to respond to the areas of interest sparked by having read this page.

on the basis of information they (or specialized companies) have gathered on the customers as well as to make recommendations for items a potential customer may like to buy; thus, this tracking and gathering results in relatively cheaper and yet more effective advertising. It may also allow sellers to price target or make specific discounts available to individual customers.[25] Therefore, if online advertising technologies are properly used, then the potential sales that businesses can generate online are clearly significantly higher than via traditional sales channels.

B. *Online Distribution and Competition Rules on Vertical Restraint*

The internet is a game-changer in marketing and distribution of products for manufacturers, distributors, consumers, as well as regulators. The challenge for competition authorities is to protect consumers from companies' anti-competitive behavior without stifling new and innovative forms of competition.[26]

For present purposes, the fundamental question is how the unprecedented changes brought about by e-commerce and internet technologies in marketing and distribution of products are reflected in competition law policy and enforcement on the two sides of the Atlantic. The advent of e-commerce certainly adds more complexity to the equation, because e-commerce's characteristics affect the ability of competition authorities to monitor firms' anti-competitive

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[25] There are a number of ways that a retailer could potentially target online prices for consumers. For example, it may be possible to use past online behavior to alter prices displayed on-screen or to restrict the product range displayed. Alternatively, prices could also be targeted based on the users' zip code, which could either be identified by the IP address or entered by the user themselves. Online behavior could also be used to target discounts for consumers.

[26] *See, e.g.*, Joaquín Almunia, Competition in Digital Media and the Internet, UCL Jevons Lecture in London, SPEECH/10/365 (July 7, 2010) [hereinafter Almunia Speech], *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/10/365; Frontier Economics Group, *E-Commerce and its Implications for Competition Policy* 8 (UK Office of Fair Trading, OFT 308, Discussion Paper 1, Aug. 2000), http://www.oft.gov.uk/shared_oft/reports/comp_policy/oft308.pdf; *see also* U.S. INTERNATIONAL COMPETITION POLICY ADVISORY COMMITTEE, FINAL REPORT TO U.S. ATTORNEY GENERAL AND ASSISTANT ATTORNEY GENERAL FOR ANTITRUST 288 (2000) [hereinafter ICPAC, FINAL REPORT], *available at* http://www.justice.gov/atr/icpac/finalreport.html ("Competition policy can play an important role in ensuring that consumers gain the benefits of this new technology and protect against those who might seek to suppress the development of e-commerce to protect their traditional advantages or alternatively use this technology to engage in anti-competitive conduct.").

practices. Yet, the borderless nature of online distribution underlines the importance of providing businesses with rules and principles that are clear, certain, and reflect the modern economic thinking on this increasingly important trade channel, specifically in the U.S. and Europe.

Today, consumers expect to be able to buy any product they wish online. While this is generally the case, not all product brands are available online.

Manufacturers design their distribution strategies around market dynamics with the goal of doing what is best for business. What matters here, though, is not whether business decisions are ultimately right or wrong, or even successful; rather, what matters is whether distribution strategies and practices are compliant with competition law. For instance, one may believe that higher prices are good for businesses, but how such higher prices are achieved may reveal issues and, ultimately, attract liability.

Manufacturers normally want to keep control of how and where their products are distributed, especially when vertical separation is deemed a more efficient business structure than vertical integration.[27] This appears all the more true in the online space, because manufacturers somehow fear that venturing into this distribution channel may give them less control over marketing and distribution and may even harm the image and goodwill of their brands.

Distribution of products, either online or offline, necessarily entails the cooperation of other undertakings (e.g. distributors, retailers and other intermediaries) or, conversely, the exclusion of certain undertakings from the distribution network.

Distribution agreements are set up to solve problems that cannot be solved more

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[27] *See* Michael Waterson & P. Dobson, *Vertical Restraints and Competition Policy*, UK OFFICE OF FAIR TRADING (1996), http://www.oft.gov.uk/shared_oft/reports/comp_policy/oft177.pdf

effectively on an individual basis. At their best, such agreements allow firms to save internal production resources, solve important coordination problems within the distribution network, give the right incentives for marketing initiatives and, ultimately, help increase sales. However, the rights and interests of manufacturers, wholesalers, intermediaries, and retailers do not always coincide.[28] Problems may arise for a manufacturer (independently of concerns about competition with rivals) from retailers taking actions designed to maximize their own profits, to the detriment of the manufacturer.

To achieve their intended goals and to harmonize interests, distribution agreements generally incorporate vertical restraints (i.e. clauses that restrict competition in a number of ways, such as exclusive distribution clauses or non-compete obligations), which may either be a response to one side of the market imposing its will on the other or from mutual agreement when they are jointly preferred. The type and nature of vertical restraints included in distribution agreements clearly depend on the problem at issue and reflect the supplier's own views on how to best market its products, taking into account the type of products, the market context, and so forth. Clearly, many product suppliers simply want to maximize sales and thereby adopt open distribution systems (free of territorial or customer restraints on dealers) with multi-brand dealers.[29]

The table below lists some of the problems that may arise in a supply-distribution relationship and the type of vertical restraints that may help solve the specific problem.

Problems in supply and distribution	***Contractual solutions***
1. Successive (manufacturer then retailer) mark-ups	Two-part tariffs

[28] *See* Pamela Jones Harbour, *Vertical Restraints: Federal and State Enforcement of Vertical Issues*, A.L.I.-A.B.A. COURSE OF STUDY, PRODUCT DISTRIBUTION AND MARKETING, at 8,(Mar. 17-19, 2005) [hereinafter Harbour].
[29] *See, e.g.,* Warren S. Grimes, *The Path Forward After Leegin: Seeking Consensus Reform of the Antitrust Law of Vertical Restraints*, 75 ANTITRUST L.J. 367, 7-9 (2008) [hereinafter Grimes].

Problems in supply and distribution	***Contractual solutions***
	Quantity requirements Retail price ceilings
2. Damaging competition between retailers	Resale price maintenance Exclusive distribution
3. Free riding by retail price discounters on the pre-sales services and/or reputation of full price dealers	Service requirements Resale price maintenance Exclusive distribution Refusal to supply Exclusive dealing
4. Providing the optimal number and density of dealers and capturing economies of scale in distribution	Resale price maintenance Refusal to supply
5. Free-riding by manufacturers on product's image, advertising, and customer drawing power or on investment in dealers	Exclusive dealing
6. Damaging competition between manufacturers exclusive dealing	Exclusive dealing Tie-in sales Exclusive distribution

Economic and legal literature traditionally indicates that vertical restraints can have both positive and negative effects on total welfare, generally, and on consumer welfare, specifically.[30]

[30] T. Buettner, A. Coscelli, T. Vergé & R. A. Winter, *An Economic Analysis of the Use of Selective Distribution by Luxury Goods Suppliers*, 5 EUR. COMPETITION J. 201 (2009), *available at* http://ec.europa.eu/competition/consultations/2008_online_commerce/index.html; Stephen Kinsella Obe, Hanne Melin & Simon Schropp, *Comments on the CRA Paper entitled "An economic Analysis of the Use of selective Distribution by luxury Goods Suppliers,"* EUR. COMPETITION J. (Apr. 2009), *available at* http://www.sidley.com/files/Publication/496ca62f-aafa-4287-b421-a7046fb23b64/Presentation/PublicationAttachment/c19eb772-ceda-4363-8f76-d024c5151b7c/ECJ5-1-kinsella.pdf; T Buettner, A Coscelli, T Vergé & RA Winter, *Selective Distribution by Luxury Goods Suppliers: A Response to Kinsella et al*, 5 EUR. COMPETITION J. 2 (Aug. 2009), *available at* www.crai.com/ecp/assets/Reply_to_Kinsella.pdf; Dennis W. Carlton & Judith A. Chevalier, *Free Riding and Sales strategies for the Internet*, XLIV J. INDUSTRIAL ECON. 4 (Dec. 2001); Chevalier, *supra* note 6; Grimes, *supra* note 29; Anders Gahnstrom & Christopher Vajda, *E.C. Competition Law and the Internet*, 21 EUR. COMPETITION L. REV. 2 (2000); Gavin Murphy, *Responding to the challenges of a globalised Marketplace*, 23 EUR. COMPETITION L.R. 5 (2002); Frances Dethmers & Pier Posthuma de Boer, *Ten Years on Vertical Agreements under Article 81*, 30 EUR. COMPETITION L.R. 9 (2009); James C. Cooper, Luke Froeb, Daniel P. O'Brien, & Michael Vita, *A comparative Study of United States and European Union approaches to Vertical Policy* (Vanderbilt U. Law Sch. Law and Economics, Working Paper No. 05-11); Douglas A. Melamed, Exclusionary Vertical Agreements, U.S. Dep't. of Justice, Address before The American Bar Association, Antitrust Section, (Apr. 2, 1998); Shubha Ghosh, *Vertical Restraints, Competition, and the Rule of Reason*, prepared as a chapter for THE LAW AND ECONOMICS OF ANTITRUST (Aug. 2007); Douglas A. Melamed, *Exclusive Dealing Agreements and other Exclusionary Conduct - Are there unifying Principles?*, 2006 ANTITRUST L. J. 2 (2006); Chris Sagers, *Proliferating Rules of Per se Legality in Antitrust: The Great Swiss Cheese and the Myth of Theoretical*

According to Jean Tirole:

> "*Theoretically, the only defensible position on vertical restraints seems to be the rule of reason. Most vertical restraints can increase or decrease welfare, depending on the environment. Legality or illegality per se thus seems unwarranted.*"[31]

Simply stated, most vertical restraints can increase or decrease welfare, depending on the circumstances in the market. Both EU and U.S. competition law doctrines generally acknowledge that vertical restraints may potentially generate substantial efficiencies,[32] but, even so, their legality must still be assessed against all prevailing circumstances in the market.[33]

In the context of the long awaited revisions to the EU competition rules applicable to vertical restraints, the debate focused on whether the current economic wisdom on the welfare effects of vertical restraints is equally valid in the context of online distribution. Sizeable lobbying efforts and the content of contributions submitted to the European Commission bear witness that there are diverging views, although EU competition rules are admittedly "stricter,"

Unification (Cleveland-Marshall Legal Studies Paper No. 09-177, Sept. 4, 2009), *available at* http://ssrn.com/abstract=1468001; Luc Peeperkorn, *Resale Price Maintenance and its alleged Efficiencies*, EUR. COMPETITION J. (June 2008); Benjamin Klein & Andres V. Lerner, *The Expanded Economics of Free-Riding: How exclusive dealing prevents Free-Riding and creates undivided Loyalty*, ANTITRUST L. J. (2007); Neil W. Averitt & Robert H. Lande, *Using the 'Consumer Choice' Approach to Antitrust Law*, ANTITRUST L. J. (2007).

[31] J. Tirole, THE THEORY OF INDUSTRIAL ORGANIZATION, 186 (The MIT Press, 1990); *see also* P. Rey & T. Verge, *Economics of Vertical Restraints*, in HANDBOOK: OF ANTITRUST ECONOMICS (P. Buccirossi ed., The MIT Press, 2008).

[32] *See, e.g.*, Commission Guidelines on Vertical Restraints, ¶ 99, 2010 O.J. (C 130) [hereinafter Vertical Guidelines] ("More generally, because of the complementary role of the parties to a vertical agreement in getting a product on the market, vertical restraints may provide substantial scope for efficiencies."). Under U.S. antitrust law, unless decidedly unreasonable, vertical restrictions on product distribution are permissible and even desirable. In Continental T.V., Inc. v. GTE Sylvania, Inc. (Sylvania), 433 U.S. 36, 97 S.Ct. 2549, (1977), the Supreme Court held that, "Vertical restrictions promote inter-brand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products." 433 U.S. at 54; *see* Arthur H. Travers, Jr. & Thomas D. Wright, *Restricted Channels of Distribution Under the Sherman Act*, 75 HARV.L.REV. 795 (1962).

[33] *See, e.g.*, Vertical Guidelines, *supra* note 32, ¶ 123 ("The assessment of restrictive agreements under Article 101(3) is made within the actual context in which they occur and on the basis of the facts existing at any given point in time."). Under U.S. antitrust law, the accepted standard for testing whether a practice restrains trade is the rule of reason, which requires the fact-finder to weigh "all of the circumstances," including "specific information about the relevant business" and "the restraint's history, nature, and effect." *See, e.g.*, *Sylvania*, 433 U.S. 36; State Oil Co. v. Khan, 522 U.S. 3, 10 (1997).

insofar as they also seek to achieve the internal market goal.[34] Interestingly, contributions were also submitted by stakeholders from the other side of the Atlantic, which shows that vertical antitrust enforcement in the online space is still seen as a "hot" antitrust topic in the U.S., even in a post-*Leegin* world.

Submissions are broadly split between those concerned about limitations on the freedom to impose vertical restraints and those advocating that vertical restrictions of online sales ultimately harm consumers.

Looking more closely at the core arguments submitted by those supporting the adoption of "neutral" competition rules, which therefore argue for *more freedom* to limit online sales, it is possible to find recurring considerations developed in the past for more traditional distribution methods:

No Anti-Competitive Effects Where There Is Strong Inter-Brand Competition. In a competitive market, it is not in the supplier's interest to impose any more restrictions than what it judges necessary to secure investment and ensure the efficient distribution of its products. Ultimately, high prices at the retail level, or limitations on the number or types of retailers, are a cost to a supplier, and would therefore be incurred in reality only if there was some offsetting benefit, like enhanced non-price product dimensions that consumers value. As the Commission

[34] Contributions submitted in the context of the public consultation during the review of the competition rules applicable to vertical agreements are available at http://ec.europa.eu/competition/consultations/2009_vertical_agreements/index.html. at http://ec.europa.eu/competition/consultations/2008_online_commerce/index.html and at http://ec.europa.eu/competition/sectors/media/online_commerce.html. Stakeholders included: Apple/iTunes, EMI, eBay, LVMH, Chanel, Google, Hewlett-Packard, Nokia, Premier League, Richemont Group, Rue du Commerce, SKY - British Sky Broadcasting Group, Warner Music Group, Autorité de la concurrence, Netherlands Competition Authority, American Antitrust Institute, American Bar Association, AmCham EU, Association des Industries de Marque, Assonime, BP Plc, Confindustria, EDEKA Zentrale, Estée Lauder, European Cosmetics Association, Federation of the Swiss Watch Industry FH, Fondazione Altagamma, Hermès International Sca., International Chamber of Commerce, L'Oréal, LVMH, Net-A-Porter.Com, Panasonic Europe, Selfridges & Co, The Japan Newspaper Publishers & Editors Association, The Swatch Group Ltd.

itself recognizes, anti-competitive effects of vertical restraints are only likely where inter-brand competition is weak and there are barriers to entry at either the producer or distributor level.

Free-Riding Issues. Pure online retailers would typically free-ride on the investments that others, mainly traditional brick-and-mortar distributors, undertake to provide pre-/after-sales services in shops (e.g. personalized advice, product demonstration, delivery and installation services, and guarantees). The free-rider issue would be resolved if the manufacturer can sell through retailers of choice that commit to offering the appropriate retail environment and related services to the consumer.

Risk of Tampering with Brand Reputation. Brands are essential for competition and for the consumer. Brands drive product innovation, give consumers choice and drive quality and safety. A brand's alluring image and the prestige of "exclusive" products, like luxury brands or high technology products, forms an integral part of the quality of the goods, as much as the material features, and can be damaged through sale in cheap outlets or online. Vertical restraints aimed at selecting appropriate distributors would allow manufacturers to rely on a network of qualified retailers who ensure that their products are offered for sale in optimal conditions in order to protect investments in product innovation, build and maintain the prestige and reputation of brands and products, and, ultimately, ensure that consumers can purchase the product of their choice in the most appropriate retail environment.

Counterfeiting. While counterfeiting can be kept under control relatively well in the offline world, online sales normally do not allow for a rigorous check. As a result, consumers may unknowingly purchase non-original products, which can ultimately damage the relationship between brands and consumers. Thus, the ability to limit sales through a network of qualified retailers is essential to prevent counterfeiting and to maintain consumer confidence in the brand.

In turn, pro-internet advocates submitted a number of similarly legitimate considerations to back the adoption of stricter rules *against* online sales limitations:

Brand Differentiation Makes Loss of Intra-Brand Competition More Damaging. At their best, brands make products look unique in the eyes of consumers. In essence, once a consumer has made the decision to buy a particular brand, intra-brand competition is the only kind of competition that really matters. Therefore, the issue becomes whether the benefits to consumers really outweigh the reduction in price competition at the retail level in cases where the manufacturer excludes online or discount retailers from its selective distribution network. For instance, with luxury goods it is perhaps easier to accept, instinctively, the need for a selective retail experience where non-price parameters of competition may be more important than price. However, if the effect of selective distribution is to push prices up by more than is justified by the level of investment required from the retailer, the issue becomes whether this is ultimately beneficial for consumers.

Internet Resellers Invest to Provide Customer Service. Internet sellers invest in infrastructure and in creating rich product information to allow consumers to make informed purchasing decisions. The free-riding argument too readily assumes that consumer satisfaction and trust is best achieved through brick-and-mortar stores and that brick-and-mortar stores innovate and develop products more effectively than internet retailers. The economics supporting the assumptions and justifications for the way in which competition law traditionally looks at free-riding arguments in relation to branded goods need to be re-evaluated. The possibility cannot be excluded that there might be a new form of reverse free-riding, or free-riding off the internet, with consumers taking advantage of the investment made by an internet retailer in its website to research and choose a product before purchasing in a brick-and-mortar store.

Cross-Border Sales and Better Deals for Consumers. Internet sales would facilitate cross-border trading opportunities by providing buyers and sellers located in one EU country with ready access to trading partners located elsewhere in the EU. Cross-border sales contribute to achieving the single internal market goal, and they also offer better deals for consumers. As online shops are increasingly capable of providing the unique look, feel and consumer experience that exclusive brands want to protect, the argument that selling on the internet risks damaging the brand value or product reputation is unfounded and is contradicted by the wider use of the online channel by brand owners themselves.

Consumers Should Be Free To Choose. Online commerce provides access to listings from local, national and international sellers, and it allows consumers to choose from an extensive range and depth of new and used products, and to compare prices at low cost, conveniently from their homes 24/7. Besides, "exclusive" products may soon become commoditized products, once consumers are familiar to them and do not need the "shopping experience."[35] There appears to be no plausible economic justification to deprive consumers of

[35] Today almost everything is sold online: books, food, music, tickets, clothing, household appliances, toys, hardware, consumer electronics, and even diamonds, luxury products, art, cars and real estate, are just some of the hundreds of products consumers can buy from thousands of online stores around the world. In a recent study, the Office of Fair Trading tried to gauge which factors and product characteristics are likely to play in favor of the e-commerce channel:

- Products where quality can be well specified within product descriptions (e.g. computers and other high-tech equipment, books, CDs, software, etc.) or consumer products with very strong brand presence (e.g. luxury goods such as fragrances and cosmetics, branded clothing, etc.).
- Products and services that traditionally involve high search costs and for which intermediation is not particularly strong, e.g. because of the low value of the products, such as second-hand goods.
- Products for which consumers value variety of choice and the ability to browse and for which good website design can make the shopping experience more enjoyable, via reviews and samples (e.g. videos, toys, home ware, electronic goods), but where the tangible characteristics are less important.
- Products that involve repeat purchases based on long shopping lists (e.g. groceries) and for which the shopping experience is essentially administrative and uninteresting.
- Products with low delivery costs relative to their value (e.g. jewelry), for which no shipping is necessary (intangible products), for which the Internet is itself a method of distribution (e.g. data, news services, research),

choosing between buying such goods online (for less) or in a traditional shop.

In sum, competition authorities in Europe and in the U.S. are aware that vertical enforcement is still necessary today, because distribution of goods is not always rational, nor is it always peaceful.

As will be discussed further, however, restrictions on online marketing and distribution restrictions are assessed according to different standards under EU and U.S. competition laws, respectively. In the EU, vertical restraints on distributors are constrained and in some cases prohibited by EU competition law; indeed, the rules recently adopted by the European Commission provide for a focused approach on restrictions of online sales, signaling concerns that vertical restraints may harm consumers if they are prevented from exploiting the full potential of such a distribution channel. This approach contrasts with the current wisdom of U.S. antitrust doctrine, which continues to adopt a relatively liberal policy towards vertical restraints - generally considered to enhance inter-brand competition - and does not make any distinction between the different channels of trade.[36]

These two approaches are addressed in the following sections.

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or for which shipping would be necessary even through conventional channels (e.g. large items, gifts).

Though useful, these factors are indicative and not set in stone. As noted above, from a consumer point of view, there are many different advantages to online shopping, including convenience and choice, but there are also concerns. Reliability, for instance, is still of vital importance. Many consumers are anxious, not only about whether the purchased good will arrive or whether it corresponds to what they have ordered and is not a fake, but also about the security of the information they reveal (including credit card details) when dealing with online retailers. Besides, many still prefer the "shop experience" involved in purchasing goods in brick-and-mortar stores, which includes the availability of sales advice or the ability to taste, try on or use a particular good before purchasing it. *See* THE OFFICE OF FAIR TRADING, E-COMMERCE AND ITS IMPLICATIONS FOR COMPETITION POLICY, 27 (Aug. 2000); *see also* EUROPEAN COMMISSION REPORT, COMPETITION ASSESSMENT OF VERTICAL MERGERS AND VERTICAL AGREEMENTS IN THE NEW ECONOMY, 66 (Nov. 2001).

[36] In *Sylvania*, the U.S. Supreme Court reasoned that, first, vertical restrictions … "promote inter-brand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products." Second, inter-brand competition is the "primary concern of antitrust law." Third, inter-brand competition provides a "significant check on the exploitation of intra-brand market power because of the ability of consumers to substitute a different brand of the same product.". Continental T.V., Inc. v. GTE Sylvania Inc. (Sylvania), 433 U.S. 36, 54, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977). In the recent Leegin Creative Leather Products v. PSKS, Inc. (Leegin), 127 S. Ct. 2705 (No. 06-480), 2007 WL 173680 (2007) judgment, the U.S. Supreme Court held "The justifications for vertical price restraints are similar to those for other vertical restraints." *Id*. at 11.

2. Antitrust Jurisdiction: An Eye to "Transatlantic Perspectives" (Defining the Borders of Online Commerce)

"Complying with the antitrust laws of different countries, which often have differing substantive and procedural rules, is increasingly becoming a burden on U.S. businesses. Over the past several years, foreign and in particular European regulators have been aggressive in their review of American companies' business practices. Some have argued that these same foreign regulators have unfairly used their power to discriminate and hinder American corporations. On the other hand, many times those bringing complaints regarding the business practices of American companies to foreign antitrust enforcement agencies have been other American companies."
U.S. Senator Herb Kohl, 10 March 2011 Washington DC[37]

In considering competition policy and the international marketplace, a key challenge stems from the recognition that law is national, but markets can extend beyond national boundaries.

In 2000, the U.S. International Competition Policy Advisory Committee ("ICPAC") specifically indicated that an emerging issue of growing importance in enforcement cooperation between U.S. antitrust authorities and their counterparts around the world, notably EU authorities, is the intersection of competition policy and electronic commerce.[38] In particular, because e-commerce on the internet is borderless in nature, jurisdictional questions regarding application of specific laws are a growing concern.[39]

Jurisdictional issues merit substantial debate and consideration as online commerce becomes an increasingly important component of cross-border commerce, and jurisdictional assessment is instrumental to determine the overall level of antitrust compliance required. Similarly, the internet complicates the task of competition authorities to monitor potentially anti-competitive behavior, and clearer rules would avoid conflicts of jurisdiction.

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[37] *See* Press Release, U.S. Senator Herb Kohl (D-WI), Chairman of the Senate Subcommittee on Antitrust, Competition Policy, and Consumer Rights, Kohl Announces Antitrust Subcommittee Agenda for the 112th Congress (Mar. 10, 2011), http://kohl.senate.gov/newsroom/pressrelease.cfm?customel_dataPageID_1464=4332.
[38] *See* ICPAC, FINAL REPORT, *supra* note 26, at 290. The International Competition Policy Advisory Committee was formed in November 1997 to address the global antitrust problems of the 21st Century. Following the completion of its work, the Committee was officially disbanded in June 2000.
[39] *Id*.

In the early days of the internet, online businesses imagined that the technologically-created ambiguity of the internet offered the opportunity to escape sovereign jurisdiction altogether, particularly foreign jurisdiction.[40] Today, while it is true that the borderless nature of the internet may still generate some ambiguity, there is no doubt that internet activities, including online commerce, are subject to antitrust laws like any other business.

However, both large and small firms engaged in online businesses should be aware that, precisely because of the borderless nature of the internet, they are potentially exposed to more, not less, public or private competition law enforcement; accordingly, they should be aware that jurisdictional issues are equally important (if not more so) for their online business as for their traditional activities.

To give a sense of what that may mean in practice for online businesses, there is no better way than looking at how eBay, one of the pioneers of online commerce, represented to its shareholders (some of) the legal risks it faces as an online business:

> *"Our success and increased visibility has driven some existing businesses that perceive our business model to be a threat to their business to raise concerns about our business models to policymakers and regulators… In particular, these established businesses have raised concerns relating to pricing, parallel imports, professional seller obligations, selective distribution networks, stolen goods, copyrights, trademarks and other intellectual property rights, and the liability of the provider of an Internet marketplace for the conduct of its users related to those and other issues…*
>
> *We are subject to the same foreign and domestic laws as other companies conducting business on and off the Internet... As we expand and localize our international activities, we become obligated to comply with the laws of the countries or markets in which we operate. In addition, because our services are accessible worldwide, and we facilitate sales of goods to users worldwide, one or more jurisdictions may claim that we or our users are required to comply with their laws based on the location of our servers or one or more of our users, or the location of the product or service being sold or provided in an ecommerce transaction. For example, we were found liable in France, under French law in*

[40] *See* Joel R. Reidenberg, *Technology and Internet Jurisdiction*, 153 U. PA. L. REV., 1951 (Fordham Law Legal Studies Research Paper No. 79 2005) [hereinafter Reidenberg], *available at* http://ssrn.com/abstract=691501.

> *the Louis Vuitton Malletier litigation for transactions on some of our websites worldwide that did not involve French buyers or sellers… Laws regulating Internet and ecommerce companies outside of the U.S. may be less favorable than those in the U.S., giving greater rights to consumers, content owners, competitors, users and other third parties. Compliance may be more costly or may require us to change our business practices or restrict our service offerings, and the imposition of any regulations on our users may harm our business. In addition, we may be subject to overlapping legal or regulatory regimes that impose conflicting requirements on us.”*[41] (Emphasis added)

The above may very well be free legal advice to all online businesses. Increased legal compliance requirements may be a proxy for a “successful” business. And yet, in the case of online businesses, that is also in part a natural consequence of the borderless nature of such activities. As eBay claims, success and increased market visibility may attract complaints from a number of different angles, including competition law, to policymakers and regulators by existing businesses that perceive business models like eBay’s to be a threat to their business.

This cannot be overlooked, particularly in a context where the number of active competition authorities around the world is on the rise, and antitrust compliance becomes more demanding and complex, in light of the differences between jurisdictions. In particular, both EU and U.S. competition laws generally apply to agreements involving imports and exports with undertakings located in third countries and agreements and practices involving undertakings located in third countries. Accordingly, compliance with competition laws requires companies that are also engaged in cross-border trade between the EU and the U.S. to take a transatlantic approach, which does not mean a one-size-fits-all solution, but rather an approach that takes into account the specific principles of the two systems.[42] Besides, antitrust laws can be a valuable

[41] *See* 2010 EBAY ANN. REP. FORM 10-K [hereinafter EBAY ANN. REP.], http://sec.gov/Archives/edgar/data/1065088/000106508811000003/ebay10k20101231.htm.
[42] Wolfgang Kerber, *An International Multi-level System of Competition Laws: Federalism in Antitrust*, *in* 2003 GERMAN WORKING PAPERS IN LAW & ECONOMICS 13, 9 (2003), http://ideas.repec.org/p/bep/dewple/2003-1-1065.html.

tool to access new markets.

In that respect, the statement of U.S. Senator Kohl (reported above) is indicative of a recent phenomenon concerning certain U.S. businesses that are feeling the pinch of competition law enforcement in Europe more than they do in their domestic markets (but the opposite, for EU companies, is not actually the case). Paradoxically, though, this occurs because some "sophisticated" companies believe that relying on stricter EU competition rules and more "active" competition law enforcers in Europe may be an effective legal strategy that is worthwhile not only to gain access to the EU markets but also as a way to indirectly fight domestic battles with their rivals.[43] In principle, nothing prevents the same from happening in the online context.[44]

Competition authorities on both sides of the Atlantic are aware of such issues and have increasingly enhanced the level of cooperation to avoid disputes over jurisdiction.[45] However, cooperation, thus far, appears mainly focused on the review of mergers compared to other areas of competition law enforcement, like cartels or dominance cases.[46] With respect specifically to

[43] *See* David S. Evans, *Antitrust Issues Raised by the Emerging Global Internet Economy*, 102 NW. U. L. REV. 285, 286 (2008). Apple, Google, eBay, Amazon, and Microsoft are just a few companies involved in such cases either as complainants or defendants.

[44] ICPAC Final Report, *supra* note 38, at 291, indicated that despite the many pro-competitive effects of electronic commerce, the potential for market insulation may inhibit the ability of both foreign and domestic companies to do business on the internet and may impede competition and entry into foreign markets. Such constraints could take the form of "hidden mercantilism," such as new or increased interventions or restraints by governments or firms, which could potentially reduce competition in national or global markets and harm both consumers and producers. According to the ICPAC, competition enforcement authorities and consumer protection regulators must communicate and cooperate to ensure that the natural tension between appropriate economic regulation and consumer protection regulations do not harm competition.

[45] EU and U.S. competition authorities (the Department of Justice and the Federal Trade Commission) cooperate primarily on the basis of two instruments: First, the 1991 EU/US Competition Cooperation Agreement, which provides for regular bilateral meetings to share information on current enforcement activities, priorities and economic sectors of common interest, and to discuss policy changes and other matters of mutual interest relating to the application of competition laws; second, the 1998 EU/US Positive Comity Agreement, according to which one party may request the other party to remedy anti-competitive behavior that originates in its jurisdiction but affects the requesting party as well.

[46] *See, e.g.*, Press Release, Mergers: Commission Clears Cisco's Proposed Acquisition of Tandberg Subject to Conditions (Mar. 29, 2010), http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/377; Press Release,

the enforcement of competition rules on vertical restraints, despite different rules and policies in the U.S. and EU, cooperation in this field is not considered a priority for U.S. and EU authorities.[47]

A. *EU Antitrust Jurisdiction*

EU competition law proscribes restrictions on commercial conduct to the extent that such agreements have an appreciable effect on trade between EU Member States. Article 101 of the Treaty on the Functioning of the European Union ("TFEU") contains a geographic limitation in that "trade between Member States" must be affected and that the anti-competitive effect of the agreement or practice must occur "within the common market."[48] Thus, in principle, the geographical scope of EU competition law (like EU law generally) is limited to the EU

Mergers: Commission Clears Intel's Proposed Acquisition of McCafee Subject to Conditions (Jan. 26, 2011),, http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/70; Press Release, Commission investigates Internet Agreements Under EU Competition Rules, IP/99/596 (July 19, 1999), http://europa.eu/rapid/pressReleasesAction.do?reference=IP/99/596&format=HTML&aged=1&language=EN&guiLanguage=en (relating to the inquiry into the licensing agreements between Network Solutions Inc. and a number of test bed registrars of second-level internet domain names in the .com, .org and .net domains).

[47] Lacking specific coordination instruments, international comity considerations should in principle prevent conflicts. Comity is a principle that requires one country to respect the interests of another in the application of its law. Comity is not a principle of international law, but it is generally the subject of bilateral agreements. In the U.S., courts and scholars have developed the concept that the exercise of an extraterritorial jurisdiction may be limited to take into account the important policy interest of another State. *See, e.g.*, F. Hoffman-La Roche v. Empagram, 542 U.S. 155, 124 S. Ct. 2359 (2004). In Europe, the Commission reflected this approach by indicating that it would be appropriate to show self-restraint in the exercise of jurisdiction when it would require any of the undertakings to act in any way contrary to the requirements of their domestic laws, or when the application of Community law would adversely affect important interests of a non-member State. *See, e.g.*, Commission Decision, Aluminium Imports from Eastern Europe, ¶ 14.7, 1985 O.J. (L92) 1, 3 C.M.L.R. 813 (1987); *see* Gavin Murphy, *Responding to the challenges of a globalized marketplace*, 23 E.C.L.R. 5, 227-230 (2002). For more general information on international co-operation, *see* J Thomas Rosch, The Three C's: Convergence, Comity, and Coordination, Speech Delivered at the St. Gallen International Competition Law Forum, (May 10-11, 2007), http://www.ftc.gov/speeches/rosch/070510stgallen.pdf; David J. Gerber, Prescriptive Authority: Global Markets as a Challenge to National Regulatory Systems, Presentation at the Conference on Transnational Business Transactions Sponsored by the Association of American Law Schools and the European Law Faculties Association, 21 (June 1-3, 2003), URL:http://www.aals.org/profdev/international/gerber.pdf; John J. Parisi, Enforcement Cooperation Among Antitrust Authorities (August 2010), http://www.ftc.gov/oia/speeches/1008enforementantitrust.pdf; A. Douglas Melamed, Antitrust Enforcement in a Global Economy, (Oct. 22, 1998), *reprinted at* http://www.usdoj.gov/atr/public/speeches/2043.htm; William J. Kolasky, *International Comity in Antitrust: Advances and Challenges*, 22 LEGAL BACKGROUNDER 16, (May 25, 2007), *available at* http://www.wlf.org/upload/05-25-07kolasky.pdf.

[48] Article 102 TFEU, which prohibits abuse of dominance, contains a similar limitation that "trade between Member States" must be affected, and the dominant position must exist "within the common market or within a substantial part thereof."

territory.[49] In practice, however, since EU competition law is usually concerned with the *economic effects* that anti-competitive agreements or abusive practices may have on the level of competition within the EU, Article 101 TFEU applies regardless of the nationality or territorial location of the undertakings concerned and irrespective of where the conduct at issue actually takes place or the anti-competitive agreement has been formed.

The European Commission generally claims jurisdiction over agreements or practices that are either *implemented*[50] or produce *effects*[51] inside the EU, even if one or more of the

[49] When an EU or a non-EU undertaking engages in conduct directly within the EU, such conduct is clearly subject to EU competition law on the basis of territorial jurisdiction. An American business with operations in the EU territory is automatically subject to the EU jurisdiction (or that of any national competition authority) like any other EU-based undertaking.

[50] *See* Commission Decision in Case COMP/39.309, Liquid Crystal Displays, ¶ 230-231, 2011 O.J. (C 295) 4. The application of Article 101 TFEU to agreements formed between undertakings outside the EU, but *implemented* within the EU, was the principal issue arising in *Wood Pulp*. *See* Joined Cases 89, 104, 114, 116, 117 and 125-129/85, A. Ahlström Osakeyhtiö v. Commission, 4 Common Mkt. Rep. (CCH) 14491 ¶ 16-18 (1988). The European Court of Justice ("ECJ") held that jurisdiction over undertakings located outside the EU for an anti-competitive agreement reached outside the EU exists under Article 101 TFEU if these undertakings "implement" such an agreement, wholly or partially, within the EU. Referring to the language of Article 101 TFEU, the ECJ noted that "competition within the common market," and therefore "implementation within the EU," exists when producers based outside the EU "sell directly to purchasers established in the EU and engage in price competition in order to win orders from those customers." *Id*. ¶ 12. The ECJ rejected the criticism that this interpretation was contrary to international law, because it was "*founded exclusively on the economic repercussions within the Common Market of conduct restricting competition which was adopted outside the Community.*" The ECJ distinguished between the place where the agreement, decision or concerted practice was *formed*, and the place where it was *implemented*, and held that the place of formation of the agreement was not material, as long as the agreement was implemented within the EU, which the ECJ found to be the case in *Wood Pulp*. The ECJ, at that time, rejected the "qualified effect test" suggested by Advocate General Darmon, whereby the Commission's jurisdiction to apply its competition rules to such conduct would have required a finding of "direct, substantial and foreseeable" effects, discussing the U.S. and international law on the subject. *Id*. ¶¶ 54-58.

[51] The General Court seems to have accepted, albeit for purposes of merger control, that the Commission could exercise its jurisdiction if the *effects* of the proposed transaction within the EU were "*direct, substantial, and foreseeable.*" Thus, the General Court effectively embraced the so called "qualified effects test" advanced by Advocate General Darmon and yet rejected by the ECJ in *Wood Pulp*. *See* Case T-102/96, Gencor v. Commission, 1999 E.C.J. II-753, ¶ 90. The General Court confirmed the Commission's decision to forbid the merger between two firms that produced platinum in South Africa, even though the merger had been cleared by the South African competition authorities. The General Court upheld the Commission's jurisdiction under the EC Merger Regulation on the basis that the concentration would be *implemented* in the EU, since the parties made significant sales to purchasers in Member States, and pointed out that, "application of the Regulation is justified under public international law when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the Community."

parties are located outside the EU.[52] Such jurisdictional tests have been interpreted broadly by the EU case law and in the Commission's decisional practice, largely because of internal market policy considerations.

However, EU jurisdiction, albeit wide, should not be considered as a foregone conclusion in all cases concerning, for instance, exports outside the EU or imports/re-imports from outside the EU. When a vertical agreement or practice involves third countries or undertakings located in third countries (i.e. outside of the EU) and the *object*[53] of such agreement or practice is not to restrict competition inside the EU, then "*it is normally necessary to proceed with a more detailed analysis of whether or not cross-border economic activity inside the Community and thus patterns of trade between Member States, are capable of being affected.*"[54] This essentially means that a thorough scrutiny is necessary before jurisdiction is established where manufacturers are not overtly aiming to "[affect] the pattern of trade between Member States,"[55] but are perhaps simply seeking either to keep control over products shipped overseas or to try to penetrate new markets.

For instance, in *Haladjian Frères*,[56] which concerned U.S. supplier Carterpillar limiting

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[52] *See also* Commission Guidelines on the Effect on Trade Concept, ¶¶ 100-109, 2004 O.J. (C 101) 81 [hereinafter Trade Concept Guidelines].

[53] In the case of imports, this category includes agreements that bring about an isolation of the internal market. For instance, this is the case with agreements in which competitors in the EU and in third countries share markets, and the competitors agree not to sell in each other's home markets, or they form reciprocal exclusive distribution agreements.

[54] *See* Trade Concept Guidelines, *supra* note 52, ¶ 106.

[55] Imports into one Member State may be sufficient to affect cross-border economic activity inside the EU. Imports can affect the competition conditions in the importing Member State, which, in turn, can have an impact on exports and imports of competing products to and from other Member States. In other words, imports from third countries that results from the agreement or practice may cause a diversion of trade between Member States, thus affecting patterns of trade. *See Id*., ¶ 101.

[56] *See* Case T-204/03, Haladjian Frères v. Commission, 2006 E.C.J. II-3779. Caterpillar's system was designed to control parallel imports of its parts from one continent to another. Thus, for example, resellers based in the EU and purchasing from the U.S. were required to identify the end users and the geographic area in which the product would end up. However, the Commission found that the system did not prevent imports into the EU from the U.S. and

"grey imports" of spare parts by resellers into the EU (or the Community as it was then called), the General Court recently held that,

> "*… in order to justify the application of the competition rules to an agreement concerning products purchased in the United States for sales in the Community, the agreement must, on the basis of a range of elements of fact and law, make it possible to envisage with a sufficient degree of probability that it is capable of having more than insignificant influence on competition in the Community and on trade between Member States … The mere fact that certain conduct produces effects, no matter what they may be, on the Community economy does not in itself constitute a sufficiently close link to be able to found Community competence. In order to be capable of being taken into account, that effect must be substantial …*"[57]

In *Javico*,[58] the ECJ considered the different circumstance of whether an export ban imposed on an EU-based distributor entrusted to solely distribute products outside the EU (Russia and Ukraine), thereby prohibiting re-imports from the allocated territory, could have an anti-competitive effect in the EU and, consequently, infringe Article 101 TFEU. The ECJ held that if, in the absence of the agreement, resale to the EU would be possible and likely, then such imports may be capable of affecting patterns of trade inside the EU, in which case the European Commission would have jurisdiction.[59]

there were no restrictions on sales within the EU. Distributors within the EU could sell freely provided that, in the case of sales to resellers, their on-sales were only within the EU.

[57] *Id*., ¶ 167. The General Court agreed that the test that must be applied is whether, in practice, the agreement in question is likely to have a more than insignificant effect on both competition and trade in the EU. *See also* Case 5/69, Völk v. Vervaecke, 1969 E.C.R. 295; Case 1/71, Cadillon v. Höss, 1971 E.C.R. 351; Case C-306/96, Javico v. Yves Saint Laurent, 1998 E.C.R. I-1983, ¶¶ 16-17. The relevant factors include the nature of the agreement and practice, the nature of the products covered by the agreement or practice, and the position and importance of the undertakings concerned.

[58] *Javico,* 1998 E.C.R. I-1983.

[59] For such effects to be likely there must be an appreciable difference between the prices of the products charged in the EU and those charged outside of the EU, and this price difference must not be eroded by customs duties and transport costs. *See, e.g.*, Commission Decision 64/233/EEC Concerning Grosfillex & Fillistorf, 1964 O.J. (L 64) 915, 1964 C.M.L.R. 237. In addition, the product volumes exported compared to the total market for those products in the territory of the common market must not be insignificant. *See Javico*, 1998 E.C.R. I-1983 ¶¶ 24, 26). Also, in Commission Decision 73/238/EEC Concerning Raymond & Co and Nagoya Rubber Co. Ltd., 1972 O.J. (L 143) 39, which concerned a license agreement between a French licensor and a Japanese licensee, a prohibition against exporting the licensed products to countries outside the licensed sales territory, including common market countries, was considered unlikely to affect intra-EU trade and competition, because export to the EU was highly improbable for technological reasons. *See also* Commission Decision Concerning Rieckermann/AEG-Elotherm 68/376/EEC,

Interestingly, in *Tretorn*,[60] the Commission found that Tretorn's prevention of parallel exports from the U.S. and into Switzerland also had an appreciable effect on trade between Member States, since the price structure in Europe and in the U.S. made re-exportation into the EU highly probable. Similarly, a ban on exports from the EU and into Switzerland did affect trade between Member States, even though the Commission found that re-exportation from Switzerland was unlikely. According to the Commission, the ban prevented Swiss traders from buying goods from one Member State and reselling them into another Member State without physically importing the goods into Switzerland, thereby affecting trade between Member States.

The main takeaway from the above is that, in principle, the jurisdictional reach of EU competition law is wide and yet determining whether it actually applies to agreements or practices involving third countries or undertakings located in third countries requires a thorough analysis of the specific circumstances of the case. This is particularly so when the object or effects of such agreements or practices may harm the attainment of the single internal market objective, which is a fundamental policy that the European Commission seeks to achieve by means of EU competition law enforcement.[61]

1968 O.J. (L 276)25, 27-28; Commission Decision Concerning 70/332/EEC Kodak, 1970 O.J. (L147) 24; Commission Decision 78/163/EEC Concerning The Distillers Company Limited, 1978 O.J. (L 50) 16, 24.

[60] *See* Case IV/32.948 - IV/34.590, Commission Decision Concerning Tretorn, 1994 O.J. (L 378) 45.

[61] On the other hand, while national competition authorities and/or national courts applying EU competition law should establish jurisdiction according to the same legal test(s) discussed above, they may, however, be less concerned with the "effects on trade" issues and more focused on the harm to competition, and ultimately to consumers, in the territory of the Member State concerned. Following the modernization of EU competition law enforcement introduced by Regulation 1/2003, in May 2004, national competition authorities and/or national courts can now fully enforce EU competition law (like the European Commission) as well as their respective national competition laws (which apply regardless of effects on trade between Member States). *See* Council Regulation 1/2003, of 16 December 2002 on the Implementation of the Rules on Competition Laid Down in Articles 101 and 102 TFEU, 2003 O.J. (L 1) 1 (EC), (as amended by Regulation 411/2004, 2004 O.J. (L 68) 1 (EC)) [hereinafter Regulation 1/2003]. The shift towards a decentralized, though parallel, enforcement of EU competition law resulted in a sharp decrease in Commission decisions dealing with vertical restraints, and a parallel increase in national authorities' decisions and courts' rulings in such matters. The Commission will focus, as a matter of priority, on cases having a "wider Community importance." *See* Case T-65/98, Van den Bergh Foods v. Commission, 2003 E.C.R II-4653 (landmark judgment where the General Court referenced to the "wider Community importance" of

B. *U.S. Antitrust Jurisdiction*

U.S. antitrust law raises similar jurisdictional issues to those just discussed briefly above. In essence, the reach of U.S. antitrust jurisdiction is also very wide. Section 1 of the Sherman Act already refers to agreements that restrain trade within the United States "or with foreign nations." The language of the Department of Justice's Antitrust Enforcement Guidelines for International Operations spells out in even clearer terms the reach of U.S. jurisdiction relating to "foreign" violations of U.S. antitrust law:

> "*Just as the acts of U.S. citizens in a foreign nation ordinarily are subject to the law of the country in which they occur, the acts of foreign citizens in the United States ordinarily are subject to U.S. law. The reach of the U.S. antitrust laws is not limited, however, to conduct and transactions that occur within the boundaries of the United States. Anti-competitive conduct that affects U.S. domestic or foreign commerce may violate the U.S. antitrust laws regardless of where such conduct occurs or the nationality of the parties involved*."[62]

Although there are striking similarities with the principles discussed above to EU jurisdictional issues, the process under U.S. law is somewhat more complex, which may seem paradoxical since the complexity arises in order to limit the far reaching scope of U.S. antitrust jurisdiction.

In fact, for almost a century, until 1982, the Sherman Act was essentially applied to all conduct in foreign countries where one could show that a transaction had a *direct* and *substantial effect* on United States commerce.[63] In practice, the scope of U.S. antitrust jurisdiction was potentially very wide and could give rise to forum shopping by private parties, particularly in the context of international cartels. As a result, in 1982, the Sherman Act was amended by the

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the issues raised by the Commission decision, namely that the Commission decision was appropriate to ensure that the Community competition rules were applied coherently to the various forms of exclusivity practiced by ice-cream manufacturers throughout the Community).

[62] *See* U.S. DEP'T OF JUSTICE, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS § 3.1 (1995).

[63] *See, e.g.*, Continental Ore Co. v. Union Carbide, 370 U.S. 690 (1962); *In re* Uranium Antitrust Litigation, 617 F.2d 1248 (7th Cir. 1980); Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 (1993).

Foreign Trade Antitrust Improvements Act ("FTAIA"),[64] which excluded much anti-competitive conduct that would *only* cause foreign injury from the Sherman Act's reach.

In substance, under U.S. antitrust law there are two principal tests for subject matter jurisdiction in foreign commerce cases.

First, with respect to foreign *imports*, the Sherman Act applies to "foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States."[65] Imports into the U.S., by definition, affect the U.S. domestic market directly, and will, therefore, satisfy the intent part of the test.

For instance, the *Hartford Fire* case concerned agreements among foreign insurers and domestic insurers in which foreign insurers would refuse to cover American domestic insurance policies that insured against certain risks. Although these agreements were negotiated outside the U.S., at Lloyds of London, and the conduct at issue was not illegal under British law, the Supreme Court held that their only purpose was to regulate the coverage of policies that insured American risks. According to the Court, if there was any effect at all, then it would be felt within the United States.

Another relevant example for present purposes relates to two recent connected lawsuits that concerned toy retailer Babies "R" Us/Toys "R" Us. Ultimately, the toy retailer settled allegations about having pressured manufacturers of baby products not to sell to online retailers that were undercutting the toy retail chain's prices.[66] The case is relevant because it concerned

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[64] Foreign Trade Antitrust Improvements Act, Pub. L. No. 97-290, 96 Stat. 1233, § 402, *amending* 15 U.S.C. § 7 (1982).
[65] *Hartford Fire Ins. Co.*, 509 U.S. at 796 (Scalia, J., dissenting).
[66] *See* BabyAge.com v. Toys "R" Us, No. 05-6792 (E.D. Pa. May 19, 2008), *motion to dismiss denied*; BabyAge.com v. Toys "R" Us (E.D. Pa. Jan. 5, 2011), *dismissed with prejudice*; McDonough v. Toys "R" Us Inc., No. 06-0242, 2009 WL 2055168 (E.D. Pa. July 15, 2009). The details of the settlements are not public. Toys "R" Us also agreed to pay a fine in a related settlement with the Federal Trade Commission. Interestingly, in addressing

agreements that involved European manufacturers of baby products who sold products into the U.S. market directly and/or via intermediaries. U.S. antitrust jurisdiction was not disputed.

With regard to the second test, concerning foreign commerce *other than import transactions* (covered by the first test above), the Sherman Act applies (based on the FTAIA amendments[67]) to foreign conduct that has a *direct*, *substantial*, and *reasonably foreseeable effect* on United States domestic, import or export commerce. Thus, conduct that lacks the requisite domestic effect, even where such conduct originates in the United States or involves American-owned entities operating abroad, is exempt from U.S. antitrust law. Leading commentators have explained that the FTAIA amendments made it clear that, "the concern of the antitrust laws is protection of American consumers and American exporters, not foreign consumers or producers."[68]

Without need to elaborate further on the complexities surrounding the application of the far-reaching arm of U.S. antitrust jurisdiction, it may be worth noting that U.S. courts have, at times, denied jurisdiction when foreign plaintiffs seek to rely on U.S. antitrust jurisdiction due to

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an objection by one of the "non-US" defendants regarding a class definition issue, the court defined the class of consumers as "All persons who directly purchased… within the U.S."

[67] The FTAIA was meant to clarify that U.S. courts do not have subject-matter jurisdiction over acts that do not hurt U.S. competition with sufficient directness. In practice, the FTAIA sets forth a general rule placing all non-import activity involving foreign commerce outside the Sherman Act's reach, but it will, in fact, bring such conduct back within the Sherman Act's reach if the conduct both (1) sufficiently affects American commerce, i.e. it has a direct, substantial, and reasonably foreseeable effect on American domestic, import, or certain export commerce, and (2) has an effect of a kind that antitrust law considers harmful, i.e. it must give rise to a Sherman Act claim. The FTAIA does not require a subjective intent to affect American domestic commerce; rather, intent is measured by an objective doctrine: foreseeability. Foreign Trade Antitrust Improvements Act of 1982 § 402, 15 U.S.C. § 6a; *see also In re* Potash Antitrust Litigation, 667 F. Supp. 2d 907 (N.D. Ill. 2009). The FTAIA excludes from the Sherman Act's reach much anti-competitive conduct that causes only foreign injury. Sherman Act § 7, 15 U.S.C. § 6a; *see also In re* TFT-LCD (Flat Panel) Antitrust Litigation, 267 F.R.D. 291, 2010-1 Trade Cas. (CCH) ¶ 76945 (N.D. Cal. 2010).

[68] *See* PHILLIP E. AREEDA & HERBERT HOVENKAMP, IA ANTITRUST LAW, 358-359 ¶ 272H (Aspen Law & Business, 2d ed., 2000) [hereinafter AREEDA & HOVENKAMP]; U.S. DEP'T OF JUSTICE, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS § 3.1 (1995). This test is applied, for instance, in cases in which a cartel of foreign enterprises, or a foreign monopolist, reaches the U.S. market through any mechanism that goes beyond direct sales, as well as in cases in which foreign vertical restrictions or intellectual property licensing arrangements have an anti-competitive effect on U.S. commerce.

the more appealing features of antitrust litigation in the United States.[69] What is more, courts' reliance on international comity considerations, in such instances, indicates that U.S. jurisdiction may be denied even though in practice the basic requirements for jurisdiction have been met.

The takeaway from the above is entirely consistent with the considerations in EU jurisdiction, with just one additional remark. Under U.S. antitrust law, as will be discussed further, vertical restraints are subject to a generous assessment under the rule of reason. As a result, both public and private enforcement has been decreasing in the last twenty or so years, in contrast to the EU. This trend should not, however, be taken as a proxy of a lower likelihood of U.S. antitrust enforcement in cases involving foreign businesses or conduct. Rather, U.S. antitrust jurisdiction remains very wide, and American enforcers and courts are prepared to look at cases where U.S. commerce or U.S. consumers may suffer as a result of anti-competitive conduct, regardless of where that conduct occurs or the nationality of the undertakings concerned.

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[69] The attraction to U.S. courts is particularly strong in the antitrust context, where plaintiffs can take advantage of jury trials, wide-ranging pretrial discovery without judicial supervision, enforcement by private plaintiffs, extra-territorial discovery, treble damages, class actions, and contingent fees. One such case was the recent *Empagran* case, where foreign companies eventually felt that the United States' expansive approach to extra-territorial application of antitrust law had reached the point where foreign antitrust claims on foreign transactions brought by foreign companies could be dealt with under the Sherman Act. F. Hoffmann-La Roche Ltd. v. Empagran S.A., No. 03-724, 542 U.S. 155 (2004), 315 F.3d 338 (vacated and remanded by the Supreme Court in *F. Hoffman-LaRoche, Ltd. v. Empagran S.A.*, U.S., 124 S.Ct. 2359, 159 L.Ed.2d 226 (2004) ("*Empagran III*")). In *Empagran*, the Supreme Court interpreted the FTAIA. *Empagran* dealt with the worldwide vitamins cartel. The Supreme Court rightly held that if a foreign market is independent from the U.S. market, then foreign plaintiffs who buy price-fixed goods in the foreign market cannot invoke the U.S. antitrust laws. To reach its conclusion, the Supreme Court made a strained construction of the FTAIA. It held that plaintiffs who buy abroad have no cause of action unless the challenged conduct's *domestic effect* "gives rise" to their claim. This language, if taken literally, is a handicap going forward and would lead to under-deterrence as well as unfairness. Plaintiffs who are directly, substantially, and foreseeably hurt by anti-competitive conduct centered in the United States should not have to show that their harm resulted from the U.S. *effect*. Rather, they should be required to show that the illegal *conduct* proximately caused their harm, and perhaps that their purchases were sufficiently linked to the United States. According to Professor Eleanor M. Fox, there is a case for repeal of the FTAIA. A substitute provision could be: "*The Sherman and FTC Acts shall not apply to harms not within the United States and not on U.S. territory.*" *See Hearing on International Issued Before the Antitrust Modernization Commission*, (Feb. 15, 2006) (testimony of Eleanor M. Fox, Professor of Trade Regulation), *available at* http://govinfo.library.unt.edu/amc/commission_hearings/pdf/Statement_Fox_final.pdf.

C. *Features of Online Commerce and Jurisdictional Issues*

The foregoing discussion indicates that both EU and U.S. authorities and courts have plenty of ammunition to tackle the whole range of anti-competitive agreements or practices that may affect competition in the EU and U.S., respectively. Yet, such principles were largely crafted when the internet did not exist, and regulators have not clarified how jurisdiction should extend to competition law issues in the international online context.

Accordingly, a question open for debate is whether certain e-commerce features may be relevant in the assessment of the circumstances upon which antitrust jurisdiction may be established or denied in cases involving online businesses. The answer is a cautious "Yes."

In actuality, U.S. and European courts have taken certain internet features into account to retain or deny jurisdiction in specific cases, but there is no common understanding between EU and U.S. authorities about how online commerce may affect, if at all, competition law jurisdiction specifically. [70]

In the U.S., shortly after it became clear that the internet would be an important channel to do business, the District Court of W.D. Pennsylvania already noted:

> "*In recent years, businesses have begun to use the Internet to provide information and products to consumers and other businesses … [T]he Internet makes it possible to conduct business throughout the world entirely from a desktop. With this global revolution looming on the horizon, the development of the law concerning the permissible scope of personal jurisdiction based on Internet use is in its infant stages.*"[71]

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[70] *See* Reidenberg, *supra* note 40.

[71] Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119 (W.D. Pa. 1997). In 1958, the U.S. Supreme Court noted that, "[a]s technological progress has increased the flow of commerce between States, the need for jurisdiction has undergone a similar increase." Hanson v. Denckla, 357 U.S. 235, 250-51, 78 S. Ct. 1228, 1237-39, 2 L. Ed. 2d 1283 (1958). Twenty-seven years later, the Court observed that jurisdiction could not be avoided "merely because the defendant did not *physically* enter the forum state" and that, "[I]t is an inescapable fact of modern commercial life that a substantial amount of commercial business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476, 105 S. Ct. 2174, 2184 (1985).

In *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, the District Court recalled that in cases concerning e-commerce where the parties are not both from the forum state, U.S. courts may have to rely on the "minimum contact" test in order to exercise jurisdiction.[72] In particular, in determining whether personal jurisdiction exists over an out-of-state defendant where minimum contacts are asserted based on *internet usage*, a "sliding-scale" approach is sometimes applied to determine the *nature* and *quality* of the commercial activities conducted by a defendant over the internet. Accordingly, internet use has been characterized as falling within three categories: (i) websites clearly used for transacting business over the internet, where conduct largely consists of forming contracts and knowingly and repeatedly transmitting files of information, which may suffice to establish minimum contacts within a state; (ii) "passive websites" used only for advertising over the internet, which are not sufficient to establish minimum contacts even though they are accessible to residents of a particular state;[73] and (iii) "interactive websites," which allow the exchange of information between a potential customer and the host computer. In the latter case, the assessment of the degree of interactivity is required to establish jurisdiction.[74]

Apart from *internet use*, U.S. courts have recently taken into account *online targeting* of

[72] General jurisdiction permits a court to exercise personal jurisdiction over a non-resident defendant for non-forum related activities when the defendant has engaged in "systematic and continuous" activities in the forum state. Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414-16, 104 S. Ct. 1868, 1872-73, 80 L. Ed. 2d 404 (1984). In the absence of general jurisdiction, specific jurisdiction permits a court to exercise personal jurisdiction over a non-resident defendant for forum-related activities where the "relationship between the defendant and the forum falls within the 'minimum contacts' framework" of International Shoe Co. v. Washington, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945). A three-pronged test has emerged for determining whether the exercise of specific personal jurisdiction over a non-resident defendant is appropriate: (1) the defendant must have sufficient "minimum contacts" with the forum state, (2) the claim asserted against the defendant must arise out of those contacts, and (3) the exercise of jurisdiction must be reasonable.

[73] The distinction between active and passive websites was developed in *Zippo Mfg. Co*. In that case, the court further observed that the sliding scale is consistent with well-developed personal jurisdiction principles and reiterated that, "Traditionally, when an entity intentionally reaches beyond its boundaries to conduct business with foreign residents, the exercise of specific jurisdiction is proper. Different results should not be reached simply because business is conducted over the Internet." *Zippo Mfg. Co.*, 952 F. Supp. at 1124 (citation omitted) (jurisdiction based on the cause of action having a nexus to isolated (but purposeful) forum activity is referred to as *specific* jurisdiction).

[74] In practice, jurisdiction in cases involving interactive websites can be determined following the assessment of the degree of interactivity.

users/consumers and the effects of such targeting activities within the territory concerned in order to establish personal jurisdiction.[75]

In Europe, on the other hand, rather than the *internet use* criterion, courts appear to give more relevance to the "targeting" approach to address jurisdictional issues arising in the context of online activities.

The recent French *Parfums Christian Dior* case,[76] involving eBay, shows that the risk of being caught by a foreign jurisdiction can be more real than just theoretical for online businesses. In particular, eBay referred to a situation where they "*…were found liable in France, under French law* [*in the Louis Vuitton Malletier litigation*] *for transactions on some of our websites worldwide that did not involve French buyers or sellers...*"[77] The case actually deals with competition law issues relating to selective distribution.

In particular, the Paris Commercial Court held eBay Inc. and its Swiss subsidiary eBay International AG jointly liable for allowing the sale of goods on its website by unauthorized distributors in violation of a selective distribution network for perfumes "to the harm of economic players such as [LVMH Group] plaintiffs companies."[78] The court retained

[75] *See* Gator.com Corp. v. L.L. Bean, Inc., 341 F.3d 1072, 1078 (9th Cir. 2003) (finding that an interactive website with advertising targeted at California residents and with relationships with California vendors and customers creates sufficient contacts for general jurisdiction), *reh'g en banc granted*, 366 F.3d 789 (9th Cir. 2004); ALS Scan, Inc. v. Digital Serv. Consultants, Inc., 293 F.3d 707, 714 (4th Cir. 2002) (holding that information transmitted into the jurisdiction over the internet that causes harm within the jurisdiction provides minimum contacts).

[76] Parfums Christian Dior v. eBay Inc, eBay International AG, Tribunal de Commerce de Paris 1ère Chambre B Jugement du 30 Juin 2008, General docket No: 200607799.

[77] *See* EBAY ANN. REP., *supra* note 41. The Commercial Court of Paris gave three decisions in favor of LVMH in three separate cases. *See Parfums Christian Dior*, General docket No: 200607799. In the first two cases LVMH Group alleged negligence on the part of eBay for not having taken steps to stop the sale of illegal copies of their trademarked goods on its website. The third case concerned the LVMH Group's perfume brands (Dior, Guerlain, Kenzo and Givenchy) and alleged negligence by eBay in not having taken steps to prevent the sale of perfumes outside the Group's selective distribution channel. Pursuant to Article L. 442-6 I 6° of the French Commercial Code, direct or indirect participation in the violation of a lawful selective or exclusive distribution network gives rise to liability for the person involved.

[78] The LVMH Group complained that eBay interfered with its selective distribution network established in France and in the EU by allowing third parties to post listings offering genuine perfumes and cosmetics for sale on eBay

jurisdiction on the basis of *accessibility* (eBay's websites were accessible to the French public)[79] and the fact that the "participation" of eBay in the violation of selected distribution networks caused plaintiffs "significant material injury in France where plaintiffs are headquartered."[80] In December 2010, the French Supreme Court affirmed the findings on the jurisdictional issues, holding that two cumulative criteria, "accessibility" of the site and the "targeting" (*destination*) of the site, are required to establish jurisdiction, and the Court found that they both existed in the specific circumstances.[81]

Other courts in Europe have adopted a similar underlying reasoning in disputes

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websites worldwide (the perfumes had labels stating that, "this article must only be sold by an authorized retailer"). In particular, eBay Inc. and its Swiss subsidiary eBay International AG were held jointly responsible for the operation of all eBay websites worldwide (including the eBay.fr site) and were ordered to pay LVMH Group almost €40 million for "*serious negligence and even 'parasitisme,'*" by failing to adopt adequate technical and human measures to prevent sales by unauthorized resellers on its website and for not having prevented the undermining of selective distribution networks. The French Commercial Court also issued an injunction prohibiting all sales of perfume and cosmetics bearing plaintiffs' brands over all worldwide eBay sites to the extent that the websites were accessible from France. In September 2010, the Paris Court of Appeal reduced the damages award to Euro 5.7 million and modified the injunction.

[79] eBay challenged the French court's jurisdiction, insofar as it would extend to "compensation for damages on a global level" (and not only in France). Indeed, eBay claimed that its ads were displayed on the U.S. website (eBay.com), and the French public was not the target of the advertisements. Additionally, eBay argued that the servers that host the company's business are located in the U.S. On the other hand, eBay's competition law arguments (rejected by the court) were that the selective distribution network implemented by the companies of the LVMH Group restricted competition (insofar as they prohibited *de facto* internet selling) and could not benefit from the general block exemption due to the plaintiffs' market share, such that, ultimately, the selective distribution agreements were void.

[80] Interestingly, with regard to jurisdiction over U.S.-based eBay Inc., the Paris Commercial Court noted that there was no agreement between France and the U.S. regarding jurisdictional conflicts, and yet the offenses were the same as those alleged for Swiss-based eBay International AG. The court established its jurisdiction over eBay International AG, the Swiss-based subsidiary of eBay Inc., on the basis of the Lugano Convention of 1988. The finding was based on Article 5-3, which provides that, "A person domiciled in a Contracting State may, in another Contracting State, be sued: in matters relating to tort…in the courts for the place where the harmful event occurred." In addition, the French Court recalled that under EU case law "*place*" means either the place where the damage occurred or the place where the event giving raise to the damage occurred. The court further noted that as internet sites are *accessible* to the French public (even though not directed to that public, since the text of the ads was in English), under the jurisprudence of the French Supreme Court, French courts have jurisdiction to hear claims for damages caused in France. In September 2010, the Paris Court of Appeal reduced the damages award to Euro 5.7 million and modified the injunction, limiting its scope.

[81] Parfums Christian Dior, Parfums Givenchy Kenzo and Guerlain v. eBay Inc. and eBay international AG, Cour de Cassation, Chambre Commercial [French Supreme Court] 09-14545 (Dec. 7, 2010). The Supreme Court upheld the jurisdiction found by the French courts because: French Internet users were directed to a site operated by eBay Inc. by entering keywords related to plaintiffs' brandmarks, a translation of the ads in question was provided in French, and French Internet users were able to dispose of the products in France.

concerning other areas of law, including copyright,[82] and criminal law.[83]

More importantly, in a recent judgment, the European Court of Justice had the opportunity to clarify what is arguably the core issue in cases involving online businesses: the concept of "accessibility of a website" for the purpose of establishing jurisdiction in relation to consumer contracts.[84]

In essence, the ECJ held that,

> "*In order to determine whether a trader whose activity is presented on its website or on that of an intermediary can be considered to be 'directing' its activity to the Member State of the consumer's domicile… it should be ascertained whether, before the conclusion of any contract with the consumer, it is apparent from those websites and the trader's overall activity that the trader was envisaging doing business with consumers domiciled in one or more Member States, including the Member State of that consumer's domicile, in the sense that it was minded to conclude a contract with them.*"

A number of factors are capable of constituting evidence from which it may be concluded that the trader's activity is directed to the Member State of the consumer's domicile,[85] including,

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[82] eBay Inc. v. Société Maceo, Cour de Cassation, Chambre Commercial [French Supreme Court] (Mar. 29, 2011), *available at* http://www.juriscom.net/documents/casscom20110329.pdf. The French Supreme Court held that the *mere accessibility* of eBay's U.S. website from within France was not sufficient to establish the jurisdiction of the French courts over a claim for copyright infringement concerning material posted on that website. According to the French Supreme Court, appellate judges would have had to check preliminarily whether the ads for counterfeit goods were intended for the public in France. In particular, eBay argued that the fact that a website was merely accessible from within France was no longer by itself sufficient to determine the jurisdiction of the French courts; it was necessary to demonstrate a *sufficient, substantial* and *significant* connection between the alleged acts of infringement and the damage claimed and, in particular, to adduce evidence that the website was aimed at the French public. It argued that, in this case, France was neither the country where the alleged damage was suffered, nor the place where the acts of infringement took place, as eBay's website was operated from the U.S. Moreover, according to eBay, ebay.com is aimed at English-speaking countries only, while ebay.fr is the site directed at France.

[83] *See* Lewis v. King, [2004] E.W.C.A. 1329 (Eng. C.A.), *available at* http://www.bailii.org/ew/cases/EWCA/Civ/2004/1329.html. The Court of Appeals for England and Wales applied that approach in a libel case, finding the place of downloading as dispositive for the choice of law.

[84] *See* Joined Cases C-585/08, Hotel Alpenhof GesmbH v. Oliver Heller, C-144/09, Peter Pammer v. Reederei Karl Schlüter GmbH & Co KG, (Dec. 7, 2010) (unpublished).

[85] According the ECJ, the following is a non-exhaustive list of matters that are capable of constituting evidence from which it may be concluded that the trader's activity is directed to the Member State of the consumer's domicile: the international nature of the activity, mention of itineraries from other Member States for going to the place where the trader is established, use of a language or a currency other than the language or currency generally used in the Member State in which the trader is established with the ability to make and confirm reservations in that other language, mention of telephone numbers with an international code, outlay of expenditure on an internet referencing service in order to facilitate access to the trader's site or that of its intermediary by consumers domiciled in other

in particular, evidence of the international nature of the activity or outlay of expenditure on an internet referencing service in order to facilitate access to the trader's site, or that of its intermediary, by consumers domiciled in other Member States.[86]

There is a growing perception that principles regulating antitrust jurisdiction should evolve along with new technologies. While internet technologies were initially designed for geographically indifferent access, thereby generating ambiguity, recent technological innovations, like modern online advertising technologies, combined with commercial needs have resulted in the ability to geographically locate internet users. This phenomenon, in turn, recreates geographic origin and destination of business activities in the internet environment.[87] Where internet participants and businesses can actively target a user's jurisdiction (or even its location within that jurisdiction) or refrain from interacting with users located in particular places, authorities and regulators can also take such factors into account to establish jurisdiction.

The cases discussed above show that EU and U.S. courts have adopted somewhat convergent approaches to address jurisdictional issues concerning online activities. Arguably, this experience constitutes a good basis for further discussion, specifically in the area of antitrust and e-commerce, which may then lead to establishing common jurisdictional criteria in this increasingly important area of antitrust enforcement.

Member States, use of a top-level domain name other than that of the Member State in which the trader is established, and mention of an international clientele composed of customers domiciled in various Member States. *Id*.

[86] The ECJ expressly held that the *mere accessibility* of the trader's or the intermediary's website in the Member State in which the consumer is domiciled is insufficient to prove that the trader's activity is directed to that Member State. The same is true for the mentioning of an email address and other contact details, or for use of a language or a currency that is the language and/or currency generally used in the Member State in which the trader is established.

[87] As discussed in detail in the following section, the European Commission is also attaching relevance to internet features, particularly online advertising, although the Commission is doing so for the purpose of assessing the circumstances in the context of vertical agreements or practices that may lead to anti-competitive partitioning of the internal market.

3. Vertical Online Restraints under EU Competition Law (In Search of the Digital Single Market)

"Although most barriers to e-commerce are regulatory or have to do with, competition policy does have a role to play in promoting the internal market. With our recently adopted rules on distribution agreements, we have taken some steps towards safeguarding consumers' rights to shop online across the EU. Companies are not allowed to establish artificial barriers that partition the internal market to the detriment of consumers and I believe that evidence of such market segmentation should be met with enforcement."

Joaquín Almunia, European Commissioner for Competition, 7 July 2010[88]

The present section addresses the new EU competition rules applicable to restrictions of online sales in distribution agreements. Those who think that headline titles should normally offer a good summary of the content may now assume that Almunia's above statement is a good proxy of what to expect from this section.

Before moving to the core of the topic, some background information is helpful to contextualize the decision of the European Commission (the "Commission" or "EC") to adopt specific competition rules for online restraints and to briefly recall some general concepts of vertical antitrust enforcement under EU competition law.

So, why new competition rules to assess vertical online restraints, and why now?

The issue is not new. In 2001, former Competition Commissioner Mario Monti warned that emerging business models of the "new economy" were not immune from competition problems and that challenging competition questions ought to be answered to facilitate the successful market penetration of Business to Consumer services.[89]

About ten years later, in presenting his report titled "New Strategy for the Single Market"

[88] Almunia, *supra* note 26.
[89] *See* Mario Monti, Competition in the e-Economy Excerpts - The New Economy in Europe: Its Potential Empact on EU Enterprises and Policies, SPEECH/01/98 in Brussels (Mar. 2, 2001), http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/01/98&format=HTML&aged=0&language=EN&guiLanguage=en; *and* Mario Monti, Competition in the New Economy, 10th International Conference on Competition, SPEECH/01/232 in Berlin, (May 21, 2001), http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/01/232&format=HTML&aged=0&language=EN&guiLanguage=en.

to EC President José Manuel Barroso, Professor Monti concluded that the "EU digital single market is not a reality yet," but once again stressed that online commerce remains instrumental to achieve greater European integration.[90] Admittedly, unlike in the U.S., the internet, and e-commerce in particular, has had some trouble winning the hearts and minds (and habits) of European people and businesses.

It is in this context that, in 2008, Mrs. Neelie Kroes (Professor Monti's successor as Competition Commissioner) launched a large scale consultation leading to the review of the competition rules applicable to distribution agreements. As usual, her message was clear: "*The people of Europe were promised a union, a place without borders: but on the internet they have not yet got it.*"[91]

The Commission chiefly wanted to address what it saw as a major development for competition law policy since the enactment of the old rules in 1999:[92] the widespread use of the internet as a modern distribution channel.[93]

[90] "In many cases, consumers make the experience that online traders refuse to accept orders from consumers from another country. Consumers are also uncertain about the confidentiality of their data, the security of the transaction and their rights in case of a problem. For retailers, the main regulatory barriers to cross-border e-commerce result from differences in consumer protection rules and other rules, such as rules on VAT, recycling fees and levies. These differences create a complex and unpredictable environment for businesses and lead to a reluctance of traders, in particular SMEs, to consider selling crossborder. The EU should urgently address the remaining obstacles to create a pan European online retail market by 2012." José Manuel Barroso & Mario Monti, *A New Strategy for the Single Market: At the Service of Europe's Economy and Society*, Report to the President of the European Commission, 44-45 (May 9, 2010), http://ec.europa.eu/commission_2010-2014/president/news/press-releases/pdf/20100510_1_en.pdf (stressing that the internet is playing a critical role to the development of the Single Market in Europe).

[91] Neelie Kroes, Former EU Competition Commissioner, Making E-commerce a Reality, Closing Remarks at Online Commerce Roundtable in Brussels (Sept. 17, 2008), http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/08/437&format=HTML&aged=1&language=EN&guiLanguage=en. ("The Internet gives more power to the individual than any technological change in history. We cannot let that power be taken away").

[92] Commission Regulation 2790/1999, of 22 December 1999 on the Application of Article 81(3) of the Treaty to Categories of Vertical Agreements and Concerted Practices, 1999 O.J. (L 336) 21-25 (EC) [hereinafter Old Block Exemption Regulation]; *Commission Notice on Guidelines on Vertical Restraints*, 2000 O. J. (C 291) 1-44.

[93] The Commission also took into consideration the recognition that buyer power in the context of vertical agreements can lead to consumer harm in certain circumstances, but most of the other changes to the existing rules are evolutionary. Such changes include the definition of a "vertical agreement" and what a "hardcore" restriction

On April 20, 2010, the European Commission published the revised Block Exemption Regulation Applicable to Vertical Agreements[94] (the "VBER") and Guidelines on Vertical Restraints[95] (the "Vertical Guidelines"). The Commission's task was very complex; not only was there little to no meaningful specific EU case law or precedents, but the Commission also sought to somewhat balance competing policy goals and, at times, contradicting arguments and opposing stakeholders' interests when framing the new rules. Alexander Italianer, the Commission's Director General for Competition, recently summarized the core of the Commission policy as follows:

> "[…] *the promotion of online sales is extremely important for the internal market in Europe because it broadens the market, improves the choices for customers, and generally speaking, enhances competition. But that doesn't mean that we should treat online sales differently from offline sales or ignore possible free-riding problems that may occur between offline and online sales. … We have tried to find a balance between strongly promoting online sales on the one hand, and on the other hand, requirements that are indispensably linked to the branding and the sales of certain products.*"[96]

In practice, the protection of brand value, albeit important, shall not be a pretext to deprive consumers of an efficient distribution channel, and, more fundamentally, it shall not impede the achievement of the single internal market imperative. This is ultimately the line that companies cannot trespass, as establishing artificial barriers that partition the internal market to the detriment of consumers will trigger antitrust enforcement.

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means in terms of enforcement of Article 101 TFEU. They also include more specific issues such as the definition of an agency agreement (generally not caught by Article 101(1) TFEU) and the criteria for assessing restrictions that have effects similar to resale price maintenance (a prohibited hardcore restriction and currently a prominent issue in competition law enforcement in Europe).

[94] Commission Regulation 330/210, of 20 April 2010 on the Application of Article 101(3) to Categories of Vertical Agreements and Concerted Practices, 2010 O.J. (L 102) 1 (EU) [hereinafter VBER]. The VBER was established on June 1, 2010 and will be valid until 2022.

[95] Vertical Guidelines, *supra* note 32, at 1.

[96] Interview with Dr. Alexander Italianer, Director General for Competition, European Commission**,** *in* The Antitrust Source April 2011 issue, *available at* http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/apr11-fullsource.pdf.

Of course, time will tell whether the VBER and Vertical Guidelines strike the right balance overall, but at least the first stone has been put on the ground.

A. *The EU Legal Framework to Assess Vertical Restraints*[97]

Article 101 TEFU is the cornerstone of the legal framework for assessing vertical restraints.[98] Article 101(1) TFEU prohibits agreements or practices that affect, by object or effect, trade between Member States and appreciably restrict or distort competition within the internal market.[99] An agreement that falls within the scope of Article 101(1) may, however,

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[97] The main instruments relating to the enforcement of EU competition law on vertical restraints are:

- Consolidated Version of the Treaty on the Functioning of the European Union art. 101, Sept. 5, 2008, 2008 O.J. (C 115) [hereinafter Art. 101 TFEU];
- Regulation 1/2003, *supra* note 61;
- VBER, *supra* note 94;
- Vertical Guidelines, *supra* note 32;
- *Commission Notice on the Application of Article 81(3) EC*, 2004 O.J. (C 101) 97;
- *Commission Notice on Agreements of Minor Importance which do not Appreciably Restrict Competition under Article 101(1) TFEU*, 2001 O.J. (C 368) 13;
- *Commission Notice on Guidelines on the Effect on Trade Concept Contained in Articles 81 and 82 of the Treaty*, 2004 O.J. (C 101) 81-96.

[98] In practice, the assessment of vertical online restraints should be done according to the following steps:

- It is first necessary to determine whether the agreement or practice falls within the prohibition in Article 101(1) TFEU, namely whether:
  - o there exists an agreement, decision or concerted practice made between or followed by undertakings;
  - o competition within the EU may be prevented, restricted or distorted;
  - o trade between EU Member States may be affected.
- If a particular agreement or practice falls within Article 101(1) TFEU, it is possible that the general VBER may apply; if not
- it is then necessary to assess whether the agreement or practice is capable of fulfilling the four cumulative conditions for an individual exemption contained in Article 101(3) TFEU (the Vertical Guidelines are relevant in that context);
- agreements or practices that fall within the prohibition in Article 101(1) TFEU, and do not benefit from either a block or an individual exemption, are legally void and unenforceable according to Article 101(2) TFEU.

[99] The main aim for EU Competition Law is set out in Article 3(1)(b) TFEU: "The Union shall have exclusive competence in [the following areas: (b) the] establishing of the competition rules necessary for the functioning of the internal market," and in Protocol No. 27 on Internal Market and Competition annexed to the Treaties: "the internal market as set out in Article 3 of the Treaty on European Union includes a system ensuring that competition is not distorted." The ECJ recently recalled that, "the vital nature of the Treaty rules on competition … which are the expression of … the essential tasks with which the European Union is entrusted… is apparent from Article 3(3) TEU, namely the establishment of an internal market, and from Protocol No 27 on the internal market and competition, which forms an integral part of the Treaties in accordance with Article 51 TEU, and states that the internal market includes a system ensuring that competition is not distorted." *See, e.g.*, Case C-496/09, Commission v. Italian Republic, ¶ 60 (Nov. 17, 2011) (unpublished). The EU Courts refer to competition as an objective of the EU legal order to support an expansive reading of the competition rules on the prohibition of anti-competitive agreements and abuse of a dominant position, as well as the State aid rules. In particular, EU competition law has a

benefit from an individual exemption under Article 101(3) TFEU if it meets the conditions in Article 101(3) TFEU, thereby bringing about sufficient benefits or efficiencies to outweigh any anti-competitive effects.[100] There is no rule of reason under EU competition law.[101]

The VBER is the other fundamental block of EU legislation relevant in this context. The VBER provides a safe harbor, which ensures that restrictions in distribution agreements that fall within the VBER's coverage will not be found to infringe the EU competition law prohibition of restrictive agreements and, consequently, be unenforceable. But even if a distribution agreement does not benefit from this safe harbor, it may not necessarily fall under Article 101(1) TFEU, or it may fall under the exception in Article 101(3) TFEU.

In this respect, the Vertical Guidelines set out the Commission's framework for assessing vertical restraints under Article 101 TFEU, even where they do not fall squarely within the safe

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combined goal of market integration and undistorted competition. The goal of market integration has historically led to a high protection of parallel trade by the Community Courts and the European Commission.

[100] To be individually exempt the agreement must: (1) contribute to production or distribution of goods or to promoting technical or economic progress, while (2) allowing consumers a fair share of the resulting benefit, and while not (3) imposing on undertakings restrictions that are not indispensable to the attainment of these objectives, and also while not (4) allowing such undertakings the possibility of eliminating competition with respect to a substantial part of the products in question. In assessing a restriction of competition under Article 101(3) TFEU, the key considerations are the objectives such as fostering competition within the internal market, the free trade between the EU member states and consumer protection. Efficiencies also play a role, since the Commission considers the benefits of vertical integration and accepts the reduction of intra-brand competition in certain circumstances. However, decisions have sometimes been made to prohibit behavior that competition authorities elsewhere (namely, in the US), unconcerned with single market considerations, would not have reached. For a broader discussion on efficiency in the context of Article 101(3) TFEU, see Copenhagen Economics, Final Report, *Practical methods to assess efficiency gains in the context of Article 81(3) of the EC Treaty*, DG ENTERPRISE AND INDUSTRY (Apr. 21, 2006), http://ec.europa.eu/enterprise/newsroom/cf/_getdocument.cfm?doc_id=411. *See also* Doris Hildebrand, *Economic Analyses of Vertical Agreements — A Self-Assessment, in* 17 INT'L COMPETITION LAW SERIES (2005). In the XXIX[th] Report on Competition Policy, former Competition Commissioner Monti identified a number of objectives to the old Block Exemption, including "freedom to contract" for most companies. EUROPEAN COMMISSION, XXIXTH REPORT ON COMPETITION POLICY, 8 (1999), http://ec.europa.eu/competition/publications/annual_report/1999/en.pdf. The fact that "freedom to contract" is no longer specifically identified as an objective may reflect recognition that a number of the new provisions in the Vertical Guidelines are intended to promote internet sales regardless of the preferences of suppliers (including suppliers with low market share).

[101] *See* Case T-112/99, Métropole Télévision II v. Commission, 2001 E.C.R. II-2459, ¶¶ 72-77; Case T-65/98, Van den Bergh Foods v. Commission, 2003 E.C.R. II-4653, ¶¶ 106-107 (where the Court stressed that, "*it is only within the framework of [Article 81(3)] that the pro- and anti-competitive aspects of a restriction may be weighed.*").

harbor provided by the VBER.[102] The Vertical Guidelines are innovative in that they provide specific guidance on online distribution restraints and are particularly relevant for the self-assessment that companies must now perform internally under the modernized competition law enforcement system in Europe introduced by Regulation 1/2003.[103]

Scope of the VBER and Vertical Guidelines. Like the previous rules, the new VBER and Vertical Guidelines also apply to vertical agreements, where the market share threshold is met, and the agreement or practice does not contain "blacklisted" hardcore restrictions.[104]

The main change to the scope of the VBER is that the benefit of the block exemption no longer depends only on the supplier's market share not exceeding 30 percent, but it also depends on the market share of the buyer not exceeding the same threshold.[105] The new policy

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[102] The rules enshrined in the Vertical Guidelines are only legally binding on the Commission, while national competition authorities ("NCAs") or national courts may, in principle, depart from such a "soft-law" instrument. Given the importance of the Commission's policy on internet sales, it would have been appropriate to include the main provisions in the VBER, which, instead, is legally binding on NCAs and national courts.

[103] Following the establishment of Regulation 1/2003, the "notification" system to obtain an individual exemption has been abolished.

[104] In practice, the VBER applies to vertical agreements between a supplier and a non-competing buyer, each holding a market share between 15% and 30%, when at least one of the parties to the contract is not a small- or medium-sized undertaking, and the agreement does not contain hardcore restraints. When the supplier and the buyer both have a market share below 15% or one party is a small- or medium-sized undertaking, then the agreement does not fall within the scope of application of Article 101(1) TFEU, provided the agreement does not contain provisions fixing resale prices or conferring absolute territorial protection on the parties or on third parties and provided that competition is not restricted in the relevant market by the cumulative effects of parallel networks of similar agreements established by several manufacturers or dealers (so-called agreements of minor importance). *See Commission Notice on Agreements of Minor Importance that do not Appreciably Restrict Competition under Art. 101(1) TFEU*, 2001 O.J. (C 368) 13. Agreements between competitors are considered to be of minor importance when the parties' *aggregate* market share does not exceed 10%. When parallel networks of similar agreements are implemented in the relevant market, then the market share threshold below which an agreement is considered of minor importance is reduced to 5% (down from 15% and 10%, respectively).

[105] VBER, *supra* note 94, art. 3.1 ("The exemption provided for in Article 2 shall apply on condition that the market share held by the supplier does not exceed 30% of the relevant market on which it sells the contract goods or services and the market share held by the buyer does not exceed 30% of the relevant market on which it purchases the contract goods or services"). The market share of the buyer is assessed on the upstream market when the buyer procures the products or services from the supplier. Requiring that the buyer's market share be below 30% may give rise to practical problems. Suppliers may find it difficult to ascertain distributors' market shares with certainty. This could result in the supplier relying on the buyer's estimate of its market position, but the buyer later tries to escape liability under the distribution agreement by arguing that, because of its market share, the agreement did not benefit from the block exemption and is invalid. A further complication may arise if a supplier is also active downstream, since exchanging such information could be anti-competitive. Besides the reduced legal certainty,

framework, as put forth by the Commission, mirrors the partly revised economic thinking that buyers, far from being passive, are increasingly able to exercise a certain amount of pressure on suppliers and that the "power struggle" going on within the supply chain can imply much more than a simple wealth transfer, as it could directly or indirectly distort the proper functioning of competition.[106]

Is it a Vertical Agreement or Unilateral Conduct? The VBER and the Vertical Guidelines apply to vertical distribution agreements, namely agreements between firms operating at different levels of the production or distribution chain for the sale and purchase of intermediate products and the purchase and resale of final products, such as agreements between a manufacturer and wholesaler or between a supplier and customer.

The European Courts have held that unilateral conduct carried out by a party to a distribution agreement, without implied or express acquiescence by the other party, does not suffice to give rise to an agreement.[107] In practice, though, the European Commission has often

buyers may also be reluctant to share this type of information with their supplier/competitor if that attracts the risk of potential antitrust liability. Moreover, some suppliers might not be able to establish uniform distribution systems throughout the EU, as the legality of each contractual arrangement will depend on the market share of the particular distributors in each geographic market. Thus, EU-wide suppliers may be forced to modify a distribution scheme in some specific Member States, while this scheme would be lawful in all other States. This might even occur when a distributor holds an important share in a given Member State simply because there are no other suitable distributors in the national territory. Indeed, this scenario may give rise to a non-trivial problem. In fact, in the context of selective distribution, it may be difficult to argue that a particular product justifies a selective distribution system in one or more Member States if the product is then distributed to "ordinary" dealers in another Member State.

[106] Some economists argue that if the need to take greater account of buyer-driven vertical restraints should be approved, then the 30% market share threshold would be quite an inadequate tool to deal with the anti-competitive effects of demand-led vertical restraints. According to the more recent economic thinking, even when the market share of the buyer is well below the levels at which supply-led vertical restraints start raising concerns in accordance with the VBER, anti-competitive effects cannot be excluded. Thus, for example, dealers with relatively insubstantial market share still gain considerable leverage from their ability to substitute other brands. *See, e.g.*, Paul W. Dobson, *Buyer-Driven Vertical Restraints*, in *The Pros and cons of Vertical Restraints* (Paper for the Swedish Competition Authority, Nov. 2008), *available at* http://www.kkv.se/upload/Filer/Trycksaker/Rapporter/Pros&Cons/rap_pros_and_cons_vertical_restraints.pdf; *see also* Simonetta Vezzoso, *Une Perspective Économique Évolutionniste a l'Égard des Restrictions Verticales*, REVUE INTERNATIONALE DE DROIT ÉCONOMIQUE, 315-333 (2008).

[107] Case C-74/04 P, Commission v. Volkswagen AG, 2006 E.C.R. I-6585; Joined Cases C-2/01 P - C-3/01 P, BAI v. Bayer and Commission, 2004 E.C.R. I-23, ¶ 141.

found or deemed vertical agreements to exist where the parties claimed to have acted unilaterally. The important question, then, relates to the distinction between *pure* unilateral conduct and *tacit acquiescence* by dealers or distributors.[108]

In particular, tacit acquiescence is deemed to exist, and therefore an agreement would be found, where one party requires explicitly or implicitly the cooperation of the other party for the implementation of its unilateral policy, and the other party "complies" with that requirement *by implementing the unilateral policy* in practice.[109] The scope of this presumption is quite broad and makes its rebuttal very difficult in principle.[110]

Blacklist Approach. The VBER functions in the same way as the old block exemption regulation. As noted, provided that they do not contain hardcore restrictions on competition, meaning restrictions on competition by object, the VBER creates a presumption of legality for

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[108] *See* Vertical Guidelines, *supra* note 32, ¶ 25. On the other hand, explicit acquiescence to a certain policy can be established if the agreement drawn up in advance provides for or authorizes a party to subsequently adopt a specific unilateral policy that will be binding on the other party.

[109] According to the Vertical Guidelines, the existence of an agreement can be inferred, for instance, from conduct considered to be coercive when the level of coercion exerted to impose an apparent unilateral policy, in combination with the number of distributors that are actually implementing the unilateral policy of the supplier would, in practice, point to tacit acquiescence by the other party or parties. *See also BMW NV and BMW Belgium Dealers*, 1978 O.J. (L 46) 33, 41, 2 C.M.L.R. 126, 139-140 (1978); Case 32/78, 1979 E.C.R. 2435, CMLR 370 (1980) (An agreement allegedly "imposed" by a supplier on his customers is still a vertical agreement); *Hasselblad*, 1982 O.J. (L 161) 18, 2 C.M.L.R. 233, ¶ 47 (1982) (Acquiescence under pressure to the wishes of a supplier may give rise to tacit acquiescence). Also, a system of monitoring and penalties, set up by a supplier to penalize those distributors that do not comply with its unilateral policy, would point to tacit acquiescence with the supplier's unilateral policy if the monitoring system allows the supplier to implement its policy in practice.

[110] Besides, paragraph 50 of the Vertical Guidelines lists a number of indirect measures that the Commission would normally construe as practices that may give rise to hardcore restrictions relating to market partitioning by territory or customer groups: refusal or reduction of bonuses or discounts, termination of supply, reduction of supplied volumes or limitation of supplied volumes to the demand within the allocated territory or customer group, threat of contract termination, requiring a higher price for products to be exported, limiting the proportion of sales that can be exported, or profit pass-over obligations. Collaboration between a manufacturer and distributor designed to identify the source of parallel imports and to put a stop to them gives rise to a concerted practice to ban exports and to protect the distributor from price competition. *See, e.g.*, Case T-43/92, Dunlop Slazenger v. Commission, 1994 E.C.R. II-441. A number of national competition authorities have also been investigating so-called "hub and spoke" (or "A-B-C") cartel cases, where retailer A is accused of using supplier B to coordinate prices with retailer C, with the lead cases involving the supply of toys in the UK. *See* JJB Sports Plc v. Office of Fair Trading, 2004 C.A.T. 17, 2005 Comp. A.R. 29; Argos & Littlewoods v. Office of Fair Trading, 2004 C.A.T. 24, 2005 Comp. A.R. 58; Argos & Littlewoods v. Office of Fair Trading, 2006 E.W.C.A. Civ. 1318.

vertical agreements depending on the market share of the supplier and the buyer.[111]

The VBER blacklists five hardcore restraints: (i) resale price maintenance (or "RPM"); (ii) territorial and customer restrictions; (iii) restrictions to sell to end-users imposed on retailers in a selective distribution system; (iv) restrictions on cross-supplies within a selective distribution system; and (v) restrictions on component suppliers to sell the components they produce to independent repairers or service providers.[112] An agreement that includes hardcore restrictions cannot benefit from the VBER, regardless of the parties' market share, and it will be presumed to have actual or likely negative *effects* on competition, as well as to not have positive effects that fulfill Article 101(3) TFEU. This double presumption is, however, rebuttable.[113]

B. *Limiting Online Sales under the EU Competition Rules*

The Vertical Guidelines are not exhaustive, and developments in online technologies will likely test in practice the rather general criteria contained therein. The core of the Commission's policy on online distribution of products may be summarized along the following broad lines:

[111] *See* Vertical Guidelines, *supra* note 32, ¶ 23. A "hardcore restriction" is a different legal concept than "restriction by object," which is a restriction on competition for which anti-competitive *effects* can be presumed in order to establish its anti-competitive nature. The anti-competitive object of an agreement may not be established solely using an abstract formula, but one must look at, *inter alia*, the content of the provisions of the agreement, the objectives it seeks to attain and the economic and legal context of which it forms a part. Hardcore restrictions are serious restrictions on competition that would, in most cases, be prohibited due to the harm they cause to consumers. A hardcore restriction may, in exceptional cases, fall outside the scope of Article 101(1) altogether, when such a restriction is objectively necessary for the existence of an agreement of a particular type or nature. In principle, the Commission may consider such claims when the marketing for the contractual products is subject to national or EU regulation (e.g. medicinal products). The Vertical Guidelines provide some examples for restrictions that may fall outside the scope of Article 101(1) or may be individually exempt under Article 101(3). *Id*. ¶¶ 60-64, 225)

[112] The scope of the blacklist is very broad. Article 4 of the VBER, however, provides for several exceptions dealing with restrictions that, although in principle falling within the blacklist, are not considered to have the object or effect of restricting competition. This paper examines the restrictions of online sales under (ii), (iii) and (iv). RPM, which is generally prohibited under EU competition law, is not addressed here.

[113] In practice, the double presumption simply means that the usual order of bringing forward evidence is reversed in the case of a hardcore restriction. *See* Regulation 1/2003, *supra* note 61, art. 2. The burden of proof rests on the party, or the authority, alleging the infringement of Article 101(1) TFEU or of any of the relevant provisions of the VBER.

- Every distributor must be allowed to use the internet to sell products[114];
- Online sales are generally considered to be passive sales, which suppliers cannot restrict in principle;
- Online sales may be restricted only in the limited cases where they are made in such way that they qualify as active selling into territories or customer groups reserved or allocated to other distributors;
- Suppliers may regulate online sales by subjecting them to certain proportionate quality standards, particularly in the context of selective distribution; and
- In limited circumstances, outright prohibitions on internet sales may qualify for an individual exemption under Article 101(3) TFEU.

In essence, the message is that the internet is a powerful tool that sellers must be able to use to reach a greater number and variety of customers; thus, manufacturers adopting exclusive or selective distribution systems will now have to accept some form of internet use by their exclusive and/or authorized distributors to market and sale products.[115] Exclusive and selective distribution, while necessarily restrictive of intra-brand competition, thus continues to benefit from the VBER, provided that the distribution agreements meet the conditions set forth in the VBER or, in individual cases, the conditions in Article 101(3).

Indirect Restrictions. Normally, indirect or "coercive" measures that may lead to market partitioning (and ultimately price discrimination) by territory or customer groups are all prohibited hardcore restrictions on the buyer's sales. Typical restrictions that are equally

[114] The discussion focuses on non-copyrighted goods and services. The term *product* includes both goods and services.
[115] Secondary services by other intermediaries "supporting" the distribution task are also subject to the competition rules in the same way as the "main" distribution activities.

applicable to online sales include:[116] refusal or reduction of bonuses or discounts, termination of supply[117], reduction of supplied volumes or limitation of supplied volumes to the demand within the allocated territory or customer group, threat of contract termination, requiring a higher price for products to be exported, limiting the proportion of sales that can be exported, and enforcing profit pass-over obligations. Indirect measures of this kind generally continue to fall within the scope of Article 101 TFEU, even if the supplier claims that it acted unilaterally.[118] The Vertical Guidelines provide specific guidance on two types of quantitative restrictions, restrictions on the amount of products that can be sold online and the imposition of different price conditions, which are discussed below in the context of selective distribution.

Exception to the Rule. There is an exception to the general prohibition of restricting passive selling. An exclusive distributor that will be the first to sell a new brand or the first to sell an existing brand on a new market, thereby ensuring a genuine entry into the relevant market, may be granted absolute protection against *active and passive sales*.[119] This is typically the case when a manufacturer wishes to enter a new market, commonly by exporting to another country for the first time, and needs to persuade a local distributor to make the investments

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[116] *See, e.g.*, Vertical Guidelines, supra note 32, ¶ 50; *see also* BELLAMY AND CHILD: EUROPEAN COMMUNITY LAW OF COMPETITION 441-444 (Peter Roth & Vivien Rose, eds.,Oxford University Press, 2010).

[117] The Court of Appeal of Leeuwarden (in Holland) held that the termination of a distribution contract of an internet distributor by bicycle supplier Batavus, under pressure from one of its largest customers (due to the low prices charged by the online retailer), constituted an anti-competitive concerted practice. In fact, the termination qualified as an indirect tool for resale price maintenance. *See* Court of Appeal of Leeuwarden Oct. 6, 2009, Batavus B.V., *available at* http://www.rechtspraak.nl/ljn.asp?ljn=BJ9567; *see also* District Court of Leeuwarden Oct. 4, 2006, Tweewielercentrum Blokker v. Batavus B.V., *available at* http://www.rechtspraak.nl/ljn.asp?ljn=AY9814.

[118] Indeed, such "coercive" measures are all prohibited hardcore restrictions on the buyer's sales, as they may lead to market partitioning (and ultimately price discrimination) by territory or customer groups.

[119] Restrictions on passive sales will generally fall outside the scope of Article 101(1) TFEU for two years. Vertical Guidelines, *supra* note 32, ¶¶ 61, 106(b). Conversely, the Vertical Guidelines provide that in the case of genuine testing of a new product in a limited territory or with a limited customer group and in the case of a staggered introduction of a new product, the distributors appointed to sell the new product on the test market or to participate in the first round(s) of the staggered introduction may be restricted in their active selling outside the test market or the market(s) where the product is first introduced without falling within the scope of Article 101(1) TFEU for the period necessary for the testing or introduction of the product. *See also* Commission Decision, of 12 December 1991 concerning Yves Saint Laurent Parfums, 1992 O.J. (L 012) 24-35.

necessary to establish the brand on the market.[120] The exception applies to both offline and online distribution.

B.1 *Online Sales and Exclusive Distribution*

In an exclusive distribution agreement, the supplier agrees to sell its products to only one distributor for resale in a particular territory or customer group.[121] At the same time, in order to limit the potential for free-riding by distributors appointed elsewhere, the supplier can prevent its direct buyers/distributors (but not their customers[122]) from actively selling into a territory or to a customer group that has been exclusively allocated or reserved. This principle applies equally to offline and online distributors.

The territorial protection conferred on an exclusive dealer varies from case to case with the stringency of the clauses intended to protect his exclusive rights. In order to assess the territorial protection that is the object or effect of such clauses, the Commission and the EU courts have consistently sought to determine whether the protection conferred is absolute or merely relative.[123]

Absolute territorial protection, namely the prohibition of both active and passive selling,

[120] This exception is different than the staggered introduction of products via different sales channels *in the same territory*, which the Commission appears not to have accepted. *See, e.g.*, Commission Decision, of 11 January 1991 concerning Vichy, 1991 O.J. (L 075) 57-63. The Commission did not accept Vichi's argument that a transitional phase of sale of innovative products through pharmacies, where use was made of the educative role of the pharmacist, would make it possible, once consumer habits have been established, to market similar products under other brand names through other distribution channels, namely through general stores. According to the Commission, this situation reflects the producer's desire to create an enduring brand image in retail pharmacies rather than a desire to prepare the ground for marketing on the general market.
[121] But the buyer is not obliged to concentrate its orders for a particular type of product with the supplier.
[122] Such a condition aims to prevent free-riding among the supplier's direct customers, but, on the other hand, it also seeks to impede a supplier from being able to prevent parallel trade by independent traders who purchase goods from any of its distributors.
[123] Vertical Guidelines, *supra* note 32, ¶ 151. A loss of intra-brand competition is especially likely at the retail level if coupled with large territories, since final consumers may be confronted with little possibility of choosing between a high price/high service and a low price/low service distributor for an important brand. *Id.* ¶ 159).

is generally not allowed unless it is objectively necessary.[124]

Identify Exclusive Territories and Customer Groups. In the online environment, as for more traditional channels, it is equally important that the supplier properly identify the areas (exclusive territory or exclusive customer group) into which active sales may be restricted. This is done either by exclusively "*allocating*"[125] a territory or customer group to one distributor or "*reserving*"[126] a territory or customer group for the supplier.

In the online space, however, the real issue is to determine when, in practice, online selling qualifies as *active* selling into territories or customer groups exclusively allocated or reserved, because the intrinsic borderless nature of the internet makes it very difficult to *protect* exclusive territories or customer groups against online sales. Despite stakeholders strongly

[124] Article 4(b) of the VBER blacklists any (either direct or indirect) restriction on the buyer's ability to sell into certain territories or to certain customers. Typically, reduced intra-brand competition and market partitioning are possible competition risks from exclusive agreements, which may facilitate price discrimination. *See, e.g.*, *id*. ¶¶ 61, 106(b).

[125] A territory or customer group is exclusively *allocated* when the supplier agrees to sell its products *only to one distributor* for distribution in a particular territory or to a particular customer group, and the exclusive distributor is protected against active selling into its territory or to its customer group by all other buyers of the supplier inside the EU, *irrespective of sales by the supplier*. *Id*. ¶ 51. In practice, an agreement would not be covered by the VBER if either the supplier appoints more than one distributor in a given territory or, although the supplier appoints only one distributor in a given territory, the distributor is not protected from active sales coming from any other distributor appointed by the supplier within the EU. Basically, a blanket obligation on a distributor not to sell actively outside of its territory will only be permitted if all other territories in the EU have been either exclusively allocated or reserved. However, in a dynamic distribution network a territory that was exclusively reserved or exclusively allocated may cease to be so, and, thus, maintaining the prohibition on active sales with respect to other territories may require both amending other distribution contracts to keep them within the VBER and informing each distributor of the complete network of exclusive territories allocated or reserved by its supplier across the EU, as well as of all the changes made in the distribution agreements. Dual distribution issues would be assessed under the horizontal guidelines. *See Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Cooperation Agreements*, 2011 O.J. (C 11) 1.

[126] Although the Vertical Guidelines do not indicate the meaning of "exclusive reservation," consistency with other rules in the guidelines would suggest that a territory or customer group may be deemed exclusively *reserved* to the supplier to the extent that either the contract goods are not sold at all in such a territory or to such a customer group (because, for instance, the supplier has decided to enter a territory only at a later stage), or the supplier exclusively sells the contract goods in such a territory or to such a customer group without distributors being appointed. (Paragraph 55 of the Vertical Guidelines provides that, in the context of selective distribution, *a territory where the supplier does not yet sell the contract products* should be regarded as a territory reserved by the supplier.)

encouraging the Commission to provide clear guidance on the issue,[127] the Commission's response confirms that its (circular) reasoning is effectively that there is no objective way to distinguish between active and passive internet sales, because internet use may in itself inherently have effects that extend beyond the distributor's own territory and customer group.[128] Indeed, the Commission's response is chiefly built around the key policy provision that internet use to sell products is generally considered a form of passive selling.

Thus, the Commission appears to have been struck by a dilemma similar to that of St. Augustine, the Christian theologian of the fourth century, who meditated on the issue of "Time" in his work entitled *Confessions*. Augustine asked himself the question, "What is time? What is its definition?" His wise answer was: "*If nobody asked me that question, I know the answer, but if somebody would like me to explain the meaning of time, I don't know*."[129]

Active vs. Passive Online Selling. Under the Vertical Guidelines, active sales mean actively approaching individual customers or a specific customer group or customers in a specific territory, whereas passive sales mean responding to unsolicited requests from individual customers.[130]

The Vertical Guidelines do provide some useful and much needed guidance as to how to detect online active selling, but they ultimately fall short of setting forth clear and sound criteria

[127] Prior to the adoption of the new rules, the Commission had considered whether such a distinction would still be meaningful in the internet context and what criteria should be used to distinguish active and passive online sales; they considered this distinction knowing that characteristics of the internet, namely its borderless nature, and technological developments, like search engines and online advertising, reduce search costs and thus blur the boundaries between active and passive sales and make the distinction between the two types of sales in the internet context uncertain and somewhat artificial. *See* EUROPEAN COMMISSION, COMMISSION'S ISSUES PAPER ON THE OPPORTUNITIES IN ONLINE GOODS AND SERVICES, http://ec.europa.eu/competition/consultations/2008_online_commerce/online_issues_paper_annex.pdf.

[128] Vertical Guidelines, *supra* note 32, ¶ 52.

[129] ST. AUGUSTINE, CONFESSIONS, XI, 14 ("*Quid est tempus? Si nemo me querit, scio. Si querenti explicare vellim, nescio.*")

[130] Vertical Guidelines, *supra* note 32, ¶ 51.

to distinguish active and passive online selling in a way that properly reflects the characteristics of the online channel and the continuing developments of internet technologies. The main shortcoming of the new rules is, arguably, that they seek to delineate a distinction that reconciles the two somewhat competing policy goals of allowing the internet to continue contributing to cross-border trade in the internal market while, at the same time, preserving the efficiency of exclusive distribution and its inherent (largely territorial) restrictions.

A restriction on the use of the internet by distributors is compatible with the VBER only to the extent that online promotion or use of the internet (to sell) would lead to active selling into other distributors' exclusive territories or customer groups.[131]

However, the right to restrict active internet selling in the context of exclusive distribution is probably of only a marginal benefit for a manufacturer concerned about online sales (such that, ultimately, selective distribution may be a better solution for the manufacturer) as a result of: i) the Commission's generous definition of the passive selling concept, ii) the absence of (or very low) search costs for consumers, and iii) the ability for them to easily purchase goods from internet sellers. Moreover, the need to keep the network of exclusive agreements continuously up-to-date, in order to comply with the VBER requirements, makes the management of such a distribution system quite burdensome and may ultimately question its economic rationale in the internet context.

B.1.a. *Use of a Website or of Third Party Platforms to Sell Online*

Like the previous rules, the Vertical Guidelines consider the use of a website to *sell* products as a form of passive selling.[132]

The use of a website to sell online gives rise to passive selling when a *customer* visits the

[131] Vertical Guidelines, *supra* note 32, ¶ 53.
[132] *Id*. ¶ 52. The Vertical Guidelines do not elaborate much on what "use of a website to sell" actually means.

website of a distributor, contacts the distributor and such contact leads to a sale.[133] The same applies if the sale is not contemporaneous to the website visit, but the website visit leads the customer to choose to automatically be kept informed by the distributor, and, as a result of the distributor's marketing efforts, a sale is completed at a later stage.[134] This is no different than what is allowed in traditional distribution channels.

Restrictions on the use of a website are prohibited if they go beyond what a supplier may reasonably do to encourage an online distributor to focus on customers within its territory. For instance, requiring a distributor to terminate transactions with credit cards not issued in the distributor's territory constitutes a hardcore restraint.[135] Similarly, agreements requiring a distributor to either block access to its website for customers from another exclusive territory or automatically redirect those customers to other websites are prohibited.[136] On the other hand, a distributor may be legitimately required to offer a number of links to websites of other

[133] The reason why using a website is generally considered a form of passive selling is that it is deemed to be a reasonable way to allow customers to reach the distributor, and its use may in itself inherently have effects that extend beyond the distributor's own territory and customer group, since such effects result from the technology allowing easy access from any location. *Id.* In principle, business websites used solely for promotion and communication, while the actual commercial transaction is carried out through traditional channels (on-site, telephone, fax, etc.), are not, strictly speaking, e-commerce websites. The wording of the Vertical Guidelines refers to "contacts" between the customer and the seller that may lead to a sale, and thus it appears to encompass all websites regardless of whether they are enabled to complete the transaction and payment online.

[134] *Id.*

[135] *Id.* ¶ 52(b).

[136] *Id.* ¶ 52(a). For instance, in 2007 the Commission sent a Statement of Objections to Apple amid allegations that the distribution agreements between Apple and major record companies contained territorial sales restrictions in breach of Article 101 TFEU. In particular, the Commission alleged that iTunes would verify consumers' country of residence through their credit card details such that consumers could only buy music from the iTunes' online store in their country of residence. The Commission later closed the case, finding that there was no anti-competitive agreement between Apple and the major record companies regarding how the iTunes store is organized in Europe; the Commission also noted that the structure of the iTunes store is chosen by Apple to take into account the country-specific aspects of copyright laws. Despite the fact that Apple (and the record companies) did not violate EU competition law, Apple decided to equalize prices for song downloads from its iTunes online store in Europe. *See generally* European Commission Website Materials, http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/07/126&format=HTML&aged=0&language=EN&guiLanguage=en, http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/22&format=HTML&aged=0&language=EN&guiLanguage=en.

distributors and/or the supplier on its own website.[137]

Language Options. The Vertical Guidelines further clarify that offering different language options on the website does not, *in itself*, change the passive character of such selling.[138] However, the presumption that the choice of a language or languages by a distributor does not necessarily imply a breach of an exclusivity obligation appears to be a far reaching policy consideration that overlooks the fact that, unlike in the U.S., different languages are spoken in the EU.[139]

Nonetheless, based on the wording of the Vertical Guidelines, if the supplier can provide additional evidence, then a legitimate claim can still be made that the use of certain language options is a form of active selling. While not decisive, the use of payment tools in different currencies,[140] the type and nature of interaction with customers located in other exclusive territories, or data relating to geographic allocation of turnover/internet traffic may constitute useful elements that a competition authority or court may well take into account. In this respect, additional helpful guidance can be found in a recent ECJ's judgment, which indicated a number of factors that are capable of constituting evidence from which it may be concluded that a trader's online activity is directed to the Member State of the consumer's domicile.[141]

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[137] Vertical Guidelines, *supra* note 32, ¶ 52(a).

[138] *Id.* ¶ 52. In previous drafts of the Vertical Guidelines, the Commission used a stronger expression to the effect that language options used in websites were considered part of passive selling. Again, it is believed that language options used in advertising, like targeted advertising tools, may be regarded as active selling.

[139] There are 23 official languages in the EU. For instance, if Finland were exclusively allocated to a distributor or reserved to the supplier, the use of Finnish by an Italian distributor to advertise and sell the contract goods on its website could hardly be considered a "reasonable way" to reach customers in Italy or in other territories that have not been exclusively allocated to another buyer or reserved to the supplier. On the other hand, a seller could not be prevented, if contacted by a customer, e.g. by phone, to communicate in the language of that customer. Indeed, this circumstance would be regarded as a form of passive selling.

[140] The Euro is currently the official currency in 17 of the 27 Member States of the European Union. The other 10 Member States still use their own currency.

[141] *See* Joined Cases C-585/08, Hotel Alpenhof GesmbH v. Oliver Heller, C-144/09, Peter Pammer v. Reederei Karl Schlüter GmbH & Co KG, (Dec. 7, 2010) (unpublished), *supra* note 84. The ECJ clarified the concept of "accessibility of a website" for the purpose of establishing jurisdiction in relation to consumer contracts. Relevant

Still, compliance with EU legislation[142] requirements may further blur the distinction between active and passive selling, insofar as, for instance, language requirements may be imposed by national legislation in order to allow customers to be able to read product information or contractual terms.[143]

Use of Third Party Websites. Arguably, the use of a website is considered *passive selling* only if the distributor uses its own website. This remark is not just meant to be legalistic. In fact, a related question, which is, however, not directly addressed in the Vertical Guidelines, is whether online retailers that use intermediaries (e.g. "affiliates programs"[144]) to drive business to the retailer's site from a territory exclusively allocated to another distributor (i.e. the territory

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factors are, in the circumstances, "the international nature of the activity, use of a language or a currency other than the language or currency generally used in the Member State in which the trader is established with the possibility of making and confirming the reservation in that other language, mention of telephone numbers with an international code, outlay of expenditure on an internet referencing service in order to facilitate access to the trader's site or that of its intermediary by consumers domiciled in other Member States, use of a top-level domain name other than that of the Member State in which the trader is established, and mention of an international clientele composed of customers domiciled in various Member States."

[142] There are a number of different EU directives concerning e-commerce: E-Commerce Directive 2000/31/EC, 2000 O.J. (L 178) 1; Directive 97/7/EC, on the Protection of Consumers in respect of Distance Contracts, 1997 O.J. (L 144) 19; EC Directive 1995/46/EC, on Transborder Flows of Personal Data, 1995 O.J. (L 201) 31; Directive 2002/58/EC on Privacy and Electronic Communications, 2002 O.J. (L 201) 37; Data Retention Directive 2006/24/EC, 2006 O.J. (L 105) 54. The recent Directive on Consumer Rights, adopted on October 10, 2011 (not yet published in the Official Journal), will replace the current Directive 97/7/EC on the protection of consumers with respect to distance contracts and the current Directive 85/577/EEC to protect consumers with respect to contracts negotiated away from business premises.

[143] Article 6.7 of the Consumer Rights Directive (not yet published) provides that, "Member States may maintain or introduce in their national law language requirements regarding the contractual information, so as to ensure that such information is easily understood by the consumer." In fact, the e-commerce Directive 2000/31/EC provides that consumer transactions are subject to the law of the country where the consumer is located.

[144] Affiliate advertising is basically an online marketing channel whereby an advertiser pays a website owner to promote the advertiser's products or services on its website. The issue of affiliate companies gained certain prominence in the U.S. with regard to the payment of local taxes by online suppliers located outside the territory where the sale occurs (i.e. where the buyer is located). For instance, members of the Amazon Affiliates Program put ads for Amazon on their websites and then get compensation when shoppers click through and buy items on Amazon. In the U.S., the recently passed California bill AB 155 requires that online retailers charge sales taxes on purchases even when their "presence" is not physical but through "affiliates." The most immediate effect of the new tax law, which is on hold until September 2012, is that Amazon notified California residents who participate in its affiliates program that it will terminate contracts with them, and they will, as soon as the law takes effect, no longer receive fees for referring site traffic that results in a online transaction.

where the affiliate business is "located"[145]) may be restricted from entering into such agreements, on the basis that these are simply a way to circumvent the restriction on active selling. While specific guidance is needed, a brief consideration can be made here.

Arguably, the use of intermediaries' websites can be prevented when intermediaries drive business to the distributor from a territory exclusively allocated to another distributor. Lacking any reference on this issue, a similar restriction may be justified either as a general prohibition of active selling, broadly interpreted, or on the basis of a "virtual location clause" requirement.

Intuitively, the prohibition of active selling directly imposed on a distributor would be meaningless if that distributor is nonetheless free to benefit from active selling done via intermediaries or by a business partner's website on its behalf. Stated differently, distributors would enjoy absolute freedom to sell online but for the possibility to extend the prohibition of active selling to the use of third party websites.[146]

As to the virtual location clause, EU competition law does not, admittedly, equate a website to a physical outlet and does not regard it as a "place of establishment,"[147] so, strictly speaking, a traditional location clause may be difficult to conceive of for online shops.[148] On the

[145] Interestingly, the E-commerce Directive 2000/31/EC provides that the place of establishment of a company providing services (or products) via an internet website is not the place at which the technology supporting its website is located or the place at which its website is accessible but the place where it pursues its economic activity.
[146] *See, e.g.*, Joined Cases C-585/08, Hotel Alpenhof GesmbH v. Oliver Heller, C-144/09, Peter Pammer v. Reederei Karl Schlüter GmbH & Co KG, (Dec. 7, 2010) (unpublished) ("In order to determine whether a trader whose activity is presented on its website <u>or on that of an intermediary</u> can be considered to be 'directing' its activity to the Member State of the consumer's domicile…") (Emphasis added).
[147] *See* Case C-439/09, Pierre-Fabre Dermo-Cosmétique SAS v. Président de l'Autorité de la Concurrence, 2011 E.C.R. I-0000 (unpublished); l'Autorité de la Concurrence against Pierre Fabre Dermo-Cosmétique SAS, Decision No 08-D-25 (Oct. 29, 2008); *see also* Advocate General Màzak, Opinion (Mar. 3, 2011) ("The sale via the internet of contract goods by an authorized dealer does not constitute operating out of an unauthorized place of establishment," but rather should be considered "a modern means of communication and marketing goods and services.").
[148] On the other hand, the supplier can limit investments in online businesses, depots, warehouses or any other type of logistic facilities in exclusively allocated territories. A location clause of this kind amounts to a restriction on active selling. *See* VBER, *supra* note 94, art. 4(b) ("The exemption provided for in Article 2 shall not apply to vertical agreements which, directly or indirectly, in isolation or in combination with other factors under the control

other hand, the Vertical Guidelines state that, "*In that context* [i.e. in the context of selective distribution], *the use by a distributor of its own website cannot be considered to be the same thing as the opening of a new outlet in a different location*" (emphasis added).[149] Interpreting that provision *a contrario*, the *use* by a distributor *of a third party website* may arguably be considered as opening a new outlet in a different (virtual) location, particularly with regard to the territory or customer group from which sales are generated.[150] If so, the concept of virtual location may be conceivable for online distribution as well.

B.1.b. *Online Advertisement: "General" vs. "Targeted" Advertisement*

The Vertical Guidelines recognize the different relevance, or perhaps nature, of online advertising from the "simple" use of a website to sell, since they require a more detailed assessment in order to determine whether online advertising actually amounts to active or passive selling.[151]

As noted, a host of innovative internet advertising technologies has created new possibilities for companies to expand the role of advertising beyond its traditional supporting role of product selling, such that online advertising is now a powerful tool in the hands of online sellers that drastically shortens the gap between advertising and the purchase. Taking advantage of modern online technologies, advertisers may design their advertising/promotional campaigns

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of the parties, have as their object: … the restriction of the territory into which, or of the customers to whom, a buyer party to the agreement, *without prejudice to a restriction on its place of establishment*, may sell the contract goods or services, except…" (emphasis added); Vertical Guidelines, *supra* note 32, ¶ 50.

[149] Vertical Guidelines, *supra* note 32, ¶ 57.

[150] It is true that the provision at issue relates to selective distribution, but the principle may also apply to exclusive distribution.

[151] Interestingly, paragraph 52 of the Vertical Guidelines reads slightly different than the corresponding paragraph (paragraph 51) of the old guidelines. Paragraph 52 reads, "In principle, every distributor must be allowed to use the internet to sell products," whereas paragraph 51 of the old guidelines stated that, "Every distributor must be free to use the Internet *to advertise or* to sell products." (Emphasis added). The current text omits the words "to advertise or," clearly distinguishing between use of a website to sell products and use of the internet to advertise. The revised language is arguably the result of a better understanding of online technologies, namely the developments in online advertising.

based on a number of criteria, like language or location, as well as on the basis of demographic criteria or consumers' tastes and preferences.[152] From a business's point of view, the ability to limit online advertising is tantamount to curb selling opportunities.

The Vertical Guidelines broadly distinguish between *general* and *targeted* online advertising (and promotion) as a proxy for passive and active selling, respectively; still, general advertising may sometimes be considered active selling as well.

In essence, investment in *general* online advertising or promotion that would be *financially attractive even if it would not reach* customers in other distributors' exclusive territories or customer groups may be indicative of passive sales.[153] As a rule of thumb, this is the case when the advertising constitutes a reasonable way to reach customers in a distributor's own territory.[154] Conversely, an investment in online advertisement or promotion that is *only attractive if it also reaches* a specific group of customers or customers in a particular territory exclusively reserved to another supplier would be regarded as a form active selling.[155]

Clearly, financial "attractiveness" is not a legal concept, so the assessment may vary

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[152] *See, e.g.*, Google Display Network Website, *Powerful Targeting Technology to Reach the Right Network*, http://www.google.com/ads/displaynetwork/find-your-audience/targeting-tools.html; *see also* Google Public Policy Blog, *Reaching Consumers Across Borders*, http://googlepolicyeurope.blogspot.com/2009/05/reaching-consumers-across-borders.html.

[153] Vertical Guidelines, *supra* note 32, ¶ 51.

[154] To oversimplify somewhat, an example of passive selling would be an advertisement campaign by a UK distributor (i.e. exclusively appointed for the UK market) of Sony cameras in social networks, like Facebook, or on an online newspaper, like FT.com, even though Facebook users or readers of the FT.com include an audience wider than simply potential British customers. More generally, similar restrictions appear legitimate to the extent that they are limited to the contract products; indeed, the distributor should generally be free to actively advertise, for instance, on its website (e.g. to promote other brands) even if such "general advertising" induces customers to visit its website but ultimately leads to a sale of the contracted brand/products. In *Cosmetics*, manufacturers removed from their distribution agreements the prohibition against using their corporate names and brands as keywords for natural (non-paid ads) search results. Conseil de la Concurrence [French Competition Board] concerning Cosmetics, Decision No. 07-D-07, ¶¶ 124-130 (Mar. 8, 2007); *see also* Conseil de la Concurrence [French Competition Board] concerning Festina France, Decision No. 06-D-24, ¶¶ 88-96 (July 24, 2006).

[155] Vertical Guidelines, *supra* note 32, ¶ 51. To oversimplify again, if the same UK distributor of Sony cameras decides to put advertisements in the online versions of German or French newspapers to reach out to potential British customers living in those countries, then such advertising may likely be considered active selling vis-à-vis the exclusive distributors in Germany or France.

significantly from case to case.

On the other hand, *targeted* advertising (when efforts to advertise a business's product or service are specifically directed at a certain territory or customer group), such as territory-based banners on third party websites or paying a search engine or online advertisement provider to have advertisements displayed specifically to users in a particular territory, is generally considered a form of active selling.[156] Similarly, unsolicited e-mails sent to individual customers within territories allocated to another dealer or reserved to the supplier (if that leads to a sale) would normally be regarded as a form of active selling that the supplier can restrict.

Thus, unlike general advertising, targeted advertising is "presumed" to constitute a form of active selling simply based on its inherent features and goals, regardless of financial considerations.

However, targeted online advertising raises a number of potentially controversial issues that may require further guidance.

For instance, it is not entirely clear whether the optimization of a website to improve the website's *natural search* result rankings should be considered "active" selling, and, consequently, whether distributors should be prevented from such investments to improve their natural search result rankings.[157] In principle, search engine optimization is no more than

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[156] Vertical Guidelines, *supra* note 32, ¶ 53. Businesses can pay to advertise on search engines and reach the appropriate audience of consumers as they type in particular search terms. The main types of advertising that search engines offer are: "Pay for inclusion," whereby the retailer pays to be included on the search results (for instance, Google states that it never accepts money to include or rank sites in its search results, and it costs nothing to appear in its organic search results), and "Pay for prominence," whereby the retailer pays to appear more prominently (higher up or with logo and other information) on the results page.

[157] General internet search engines display two types of results based on the key words used by users searching for information: (i) unpaid search results, which are sometimes referred to as "natural" or "organic" search results and are displayed in a particular order that is determined by an algorithm, and (ii) paid search results, also referred to as sponsored links, the position of which is normally determined by the relevance of the advertisement to the user's query and the advertiser's willingness to pay per user click. While in principle nobody can buy a position in natural or organic results, search engine optimizers can help a website to be found more easily on natural search results.

"technical maintenance" relating to the *use* of the website; at most, it only affects natural search results, like all websites inherently do, and should logically be considered a form of passive selling.[158]

On the other hand, a different approach may be that website optimization is in fact an "effort made to be found," which can be enough evidence to suggest that it is active selling. In addition, one must bear in mind that such "effort" requires payment to specialized service providers.

Similarly, another question is whether "retargeting" (or "remarketing") practices should be considered active selling, which, in turn, a supplier would be allowed to restrict.[159]

Retargeting is a slightly different model of behavioral/targeted advertising. Its aim is to target consumers who have already found or visited a website and nearly purchased a product but left the site before doing so. The ad generally follows previous internet actions that, however, did not result in a conversion.[160]

Again, two different sets of arguments can be made in this context. First, one may argue that retargeting should be considered a form of passive selling, because it is directed to potential customers who have already "found" or "visited" a website in the first place. This argument is strengthened by the fact that average internet users are generally aware that an inherent feature of

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[158] Referencing on a search engine essentially means that, as a result of the search engine's indexation of the web, a link to a distributor's website is displayed in the organic results. From this point of view, the optimization of the website does not constitute an active approach intended to reach territories/customers exclusively allocated to other distributors, and it is hardly distinguishable from ordinary website maintenance or presentation to the public. Also, the "risk" of being referenced by price comparison sites outside its own territory cannot play against the distributor that offers good deals. Ultimately, if the supplier obliges the distributor to withdraw from the referencing service provider website, then the distributor could have a material inability to sell online.

[159] *See, e.g.*, Research Study, *Online Targeting of Advertising and Prices*, UK OFFICE OF FAIR TRADING 24, http://www.oft.gov.uk/OFTwork/markets-work/completed/online-targeting.

[160] A conversion can be defined as an action intended by the site owner; this typically includes subscribing to an email list, registering for membership with a website, and/or actually making a purchase. For instance, when a person visits Nike.com and looks at a pair of Nike running shoes, a cookie is placed into that person's browser that links it with the shoes. When that person visits another site, the advertising system creates an ad for those very shoes.

the internet is that cookies are automatically placed on users' PCs when browsing the internet; thus, they can easily limit behavioral targeting by enacting "private browsing" tools to prevent tracking, if they wish.[161] On the other hand, one may also argue that retargeting amounts to active selling unless the customer has *specifically* opted to be kept automatically informed by the distributor before leaving the website visited, in the same way the customer may opt to receive other forms of marketing, such as e-mails.[162]

B.1.c. *Competition Rules and Intellectual Property Rights: Trademark*

Like in the past, the Vertical Guidelines do not venture into the gray area that concerns vertical agreements containing provisions on intellectual property rights ("IPRs"). IPRs raise difficult questions under competition law due to the tension between, on the one hand, systems that confer legal monopolies and, on the other hand, systems that are intended to ensure free competition. This is a field riddled with exceptions and overlapping legislation, so the Commission probably sought to avoid the risk of oversimplifying complex and still developing issues in just a few paragraphs in the Vertical Guidelines. Besides, EU Courts are currently facing novel questions regarding the enforcement of IPRs in the context of online advertising, which raise borderline issues with competition law. This paper does not aim to do the Commission's job or anticipate the EU Courts, but a few brief considerations may be appropriate due to the growing importance of these issues.

A typical concern of EU competition law is that manufacturers may seek to circumvent

[161] Former Competition Commissioner Mario Monti expressed the view that, "*taking steps to facilitate sales to customers who have already found the site*" would be considered passive selling. *See* Mario Monti, Former EU Competition Commissioner, The New Economy in Europe: its Potential Impact on EU Enterprises and Policies, Speech Presented in Brussels (Mar. 2, 2001), http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/01/98&format=PDF&aged=1&language=EN&guiLanguage=en.

[162] *See, e.g.*, Vertical Guidelines, *supra* note 32, ¶ 52. A colorful parallel in the offline environment would be if a consumer who has visited a shop without buying anything is then followed by an unleashed salesman for the simple fact of having visited the shop.

the prohibition of hardcore restraints by either attaching serious restraints on competition to IPRs, rather than to the vertical agreement itself, or by enforcing IPRs in breach of the EU competition rules.

This issue is becoming particularly relevant in the context of online advertising, where, for instance, IPRs owners seek to curb online sales by enforcing their trademark rights.[163] The ECJ recently held that although the trademark is an essential element in the system of undistorted competition that European law seeks to establish, its purpose is not, however, to protect its proprietor against practices inherent in competition, such as internet advertising,[164] or, more fundamentally, to frustrate EU competition law enforcement itself.[165]

The issue of the improper use of trademark rights or brand restrictions may arise, for instance, in relation to online advertising initiatives undertaken by exclusive distributors (see discussion below on similar issues in the context of "selective distribution").

For instance, the manufacturer/licensor may grant exclusive trademark licenses to all its exclusive distributors in connection with the distribution of products in their respective

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[163] Directive 89/104/EEC, of 21 December 1988 to Approximate the Laws of the Member States Relating to Trade Marks, art. 5, 1989 O.J. (L 40) 1 [hereinafter First Trademark Directive]. The First Trademark Directive confers on the trademark proprietor exclusive rights that entitle him, *inter alia*, to prevent any third party from importing goods bearing the mark, offering the goods, putting them on the market or stocking them for these purposes, *or using the trademark sign on advertising*. Articles 6 and 7 of the First Trademark Directive contain rules limiting the right of the proprietor of a trademark, under Article 5, to prohibit a third party from using his mark and are ultimately intended to reconcile the interests of trademark protection and those of free movement of goods within the Community. For instance, Article 7(1) provides that the trademark proprietor's rights are exhausted when the goods have been put on the market in the EEA by him or with his consent, unless legitimate reasons exist for him to oppose further commercialization of the goods. *See* Joined Cases C 414/99 to C 416/99, Zino Davidoff SA and Levi Strauss v. A & G Imports Ltd. And Tesco Stores Ltd., 2001 E.C.R. I-8691, ¶ 40; Case C-244/00, Van Doren + Q GmbH v. lifestyle + sportswear Handelsgesellschaft mbH and Michael Orth, 2003 E.C.R. I-3051, ¶ 33; Case C-16/03, Peak Holding AB v. Axolin-Elinor AB, 2004 E.C.R. I-11313, ¶ 34. In certain circumstances, exhaustion of that exclusive right occurs when the goods are put on the market *by a person with economic links to the proprietor*. This is particularly the case where that person is *a licensee*. *See, e.g.*, Case C 9/93, IHT Internationale Heiztechnik and Danzinger v. Ideal-Standard GmbH and Wabco Standard GmbH, 1994 E.C.R. I-2789, ¶ 34. Consequently, when a licensee puts goods bearing the mark on the market, he must, as a rule, be considered to be doing so with the consent of the proprietor of the trademark for the purposes of Article 7(1) of the First Trademark Directive.

[164] *See* Case C-323/09, Interflora Inc., Interflora British Unit v. Marks & Spencer plc Flowers Direct Online Ltd., EUR-Lex CELEX LEXIS 62009CJ0323, ¶ 57 (Sept. 22, 2011) (unpublished).

[165] *See* Joined Cases 56 and 58/64, Consten and Grundig v. Commission, 1966 E.C.R. 299.

territories.[166] Concerned about complaints from/among its distributors, the manufacturer may therefore consider whether, under EU competition law, it can legitimately restrict the use of its trademark as a keyword for paid listings in search engines (e.g. paid *targeted* advertising) by its exclusive distributors.[167]

In principle, under certain conditions,[168] the VBER also applies to exclusive distribution agreements containing provisions that relate to the assignment to the buyer or use by the buyer of trademark rights (as well as other IPRs), which means that the VBER may cover ancillary trademark licenses.[169]

In particular, one of the conditions in the VBER is that the IPRs provisions must not contain restrictions on competition that have the same *object* as vertical restraints not exempted

[166] A trademark licence to a distributor may be linked to the distribution of products in a particular territory; so, if it is an exclusive licence, then the agreement amounts to exclusive distribution. *See also* Vertical Guidelines, *supra* note 32, ¶ 39.

[167] A similar question may relate, for instance, to the use of "protected" pictures of products or packaging in other forms of online advertising. It was noted above that restrictions on the use of corporate names and brands as keywords for natural search results (non-paid advertising) was "prohibited" in France. *See Cosmetics,* Decision No. 07-D-07, ¶¶ 124-130; *Festina France*, Decision No. 06-D-24, ¶¶ 88-96.

[168] *See* Vertical Guidelines, *supra* note 32, ¶¶ 33-37. The following five conditions must be fulfilled:

> (a) The IPR provisions must be part of a vertical agreement, that is, an agreement to purchase or distribute goods or an agreement to purchase or provide services and not an agreement concerning the assignment or licensing of IPRs for the manufacture of goods, nor a pure licensing agreement;
> (b) The IPRs must be assigned by the supplier to, or licensed for use by, the buyer and not vice-versa;
> (c) The IPR provisions must not constitute the primary object of the agreement, but restrictions concerning the assignment or use of IPRs can be covered when the main object of the agreement is the purchase or distribution of goods or services and the IPR provisions must serve the implementation of the vertical agreement;
> (d) The IPR provisions must be directly related to the use, sale or resale of goods or services by the buyer or its customers. In the case of franchising where marketing forms the object of the exploitation of the IPRs, the goods or services are distributed by the master franchisee or the franchisees;
> (e) The IPR provisions, in relation to the contract goods or services, must not contain restrictions on competition having the same object as vertical restraints that are not exempted under the VBER.

[169] VBER, *supra* note 94, art. 2.3 ("The exemption provided for in paragraph 1 shall apply to vertical agreements containing provisions which relate to the assignment to the buyer or use by the buyer of intellectual property rights… on condition that, in relation to the contract goods or services, those provisions do not contain restrictions of competition having the same object as vertical restraints which are not exempted under this Regulation"). Recital 3 of the VBER also states that, "The category of agreements which can be regarded as normally satisfying the conditions laid down in Article 101(3) of the Treaty… also includes vertical agreements containing ancillary provisions on the assignment or use of intellectual property rights." The concept of an ancillary restriction covers any restriction that is directly related and necessary to the implementation of a main operation. *See, e.g.*, Case T-112/99 Métropole Télévision v. Commission, 2001 E.C.R. II-2459, ¶¶ 103-117.

under the VBER.[170] Accordingly, an exclusive trademark license linked to the distribution of products in a particular territory may not result, for instance, in absolute territorial protection, namely the prohibition of passive sales, which is a hardcore restriction incompatible with Article 4(b) of the VBER.[171] In the same sense, it is a breach of EU competition law for the trademark owner to *enforce* the trademark rights by protecting the exclusive distribution system in order to confer absolute territorial protection.[172] In essence, IPRs cannot be used to circumvent the prohibition of hardcore restraints enumerated in the VBER.

Accordingly, under EU competition law the use of a trademark (by a an exclusive distributor/licensee) as a keyword for paid listings in search engines may be restricted to the extent that such use may lead to *active* selling into other distributors' exclusive territories or customer groups (for instance, the parties may agree to use the trademark in advertising to target only the distributor's own territory or customer group), while a blanket prohibition may likely be regarded as a *de facto* prohibition of passive selling.[173]

C. *Online Sales and Selective Distribution*

Besides entering into exclusive distribution agreements, the supplier may also restrict the number of authorized distributors and the possibilities for resale by setting up a selective

[170] *See* Vertical Guidelines, *supra* note 32, ¶ 37. The restrictions must not have the same object as the "hardcore" restrictions listed in Article 4 VBER or the non-compete restrictions in Article 5. The old Regulation stated that the block exemption did not apply if the IPR provisions contained restrictions on competition having the same object *or effect* (this is now omitted) as vertical restraints that are not exempted.

[171] *See Consten and Grundig v. Commission*, 1966 E.C.R. 299 ("*The Community rules on competition do not allow the improper use of rights under national trade-mark law in order to frustrate the Community's law on cartels*."); *see also* Cases C-403/08 and C-429/08, Football Association Premier League and Others v. QC Leisure and Others Karen Murphy v. Media Protection Services Ltd, EUR-Lex CELEX LEXIS 62008CJ0403 (Oct. 4, 2011) (unpublished) (the ECJ found that the clauses of an exclusive license agreement formed between a holder of IPRs and a broadcaster constitute a restriction on competition prohibited by Article 101 TFEU where they oblige the broadcaster not to supply decoding devices giving access to that right holder's protected subject-matter outside the territory covered by the license agreement concerned.).

[172] Enforcement of IPRs should not be a pretext to punish successful distributors for their passive selling. *See, e.g.*, Case 119/75, Tarrapin v. Terranova, 1976 E.C.R. 1039, 2 C.M.L.R. 482 (1976).

[173] *See* Commission Decision (78/253/EEC), of 23 December 1977 Concerning Campari-Re the Agreement of Davide Campari Milano Spa, 1978 O.J. (L 70) 69, 2 CMLR 397 (1978), Common Mkt. Rep. (CCH) ¶ 10035 (1978).

distribution system (but the two systems are not cumulative). As a general rule, the establishment of a selective distribution system is motivated by the nature of the product and is characterized by significant investment in shop premises, staff training, and pre- and after-sales services.[174]

From a legal point of view, there are at least two fundamental differences between selective distribution and exclusive distribution. First, the restriction on the number of dealers in selective distribution does not depend on the number of territories, but must be based on objective and transparent selection criteria that, in most cases, relates to the nature of the product (in fact, selective distribution is almost always used to distribute branded or complex products).[175] Second, provided that the supplier adopts transparent and objective criteria to select authorized distributors, the ability to restrict resale by the selected dealers is not limited to restrictions on active selling, but extends to any sales to non-authorized distributors, leaving only appointed dealers and final customers as possible buyers.[176] The ability to restrict sales to non-authorized dealers gives selective distribution systems a closed nature, which makes this distribution model well-suited to avoid pressure by price discounters (whether offline or online-only distributors) on the margins of the manufacturer and its authorized dealers.

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[174] Manufacturers of branded products claim restrictions of online sales are warranted, because pure online shops free-ride on marketing and promotional investments and jeopardize the existence of selective distribution networks, which are particularly valued by customers.

[175] *See* Case 107/82, AEG-Telefunken AG v. Commission, EUR-Lex CELEX LEXIS 61982J0107, ¶ 33 (Oct. 25, 1983). In *L'Oréal*, the ECJ clarified that the selection of dealers must be justified by requirements relating to the nature of the product in question and should be made on the basis of objective criteria of a qualitative nature relating to the technical qualifications of the reseller and his staff and the suitability of his trading premises; furthermore, those criteria must be uniformly applied without discrimination to all potential resellers. *See* Case 31/80, NV L'Oréal and SA L'Oréal v. PVBA "De Nieuwe AMCK" (L'Oréal), 1980 E.C.R. 3775; *see also* Vertical Guidelines, *supra* note 32, ¶ 81.

[176] *See* VBER, *supra* note 94, art. 4(b)(iii) (exempting"the restriction of sales by the members of a selective distribution system to unauthorised distributors within the territory reserved by the supplier to operate that system"). Clearly, unauthorized dealers may purchase products as "disguised" end consumers for the purpose of reselling them.

Under EU competition law, limitations inherent in a selective distributions system,[177] such as the reduction of intra-brand price competition from price discounters (including online sellers) and the risk of foreclosing more efficient distributors, are acceptable only on the condition that there are other legitimate requirements whose aim is in fact an overall improvement of competition in relation to factors other than price (e.g. the maintenance of a specialist trade capable of providing specific services to high-quality and high-technology products). Otherwise, the selective distribution system would be a restriction on competition by object with the sole purpose of reducing intra-brand price competition.[178]

The restrictions of online sales discussed below chiefly relate to "quality standards requirements" that the supplier may impose on its authorized distributors. In essence, the manufacturer cannot generally introduce limitations prohibiting or discouraging authorized distributors from engaging in online sales (for comparison, see the discussion above about "exclusive distribution"). On the other hand, the manufacturer may legitimately impose quality standards requirements that aim to ensure that the activities (both online and offline) of its

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[177] The restriction on competition resulting from selective distribution may be more pronounced when a majority of the main suppliers adopt the same type of distribution system (cumulative effect). *See* Vertical Guidelines, *supra* note 32, ¶¶ 178-179.

[178] In the recent case *Pierre Fabre*, the Court held that an absolute ban on online selling of contract goods to end-users, imposed by a supplier on its authorized distributors within the framework of a selective distribution network, constitutes a hardcore restriction on competition by object and that the aim of maintaining a prestigious image is not a legitimate aim for restricting competition *Pierre Fabre*, 2011 E.C.R. I-0000, ¶ 39, 46. *But see* Press Release, European Commission, IP/02/915, Commission clears Loudspeakers distribution system after the company deletes hard-core violations, (June 24, 2004) (according to which B&W Loudspeakers could refuse a retailer's requests to do distant selling on the basis of the need to maintain the brand image and reputation of the products); *see also AEG-Telefunken AG*, EUR-Lex CELEX LEXIS 61982J0107, ¶ 34; Vertical Guidelines, *supra* note 32, ¶ 178. In Case 75/84, Metro v. Commission ('Metro II'), 1986 E.C.R. 3021, the Court stated that some limitation in price competition is inherent in any selective distribution system due to lack of competition between specialist and non-specialist dealers but that the lack of price competition was compensated by competition concerning quality of service supplied to customers, which is not normally possible in the absence of an adequate profit margin covering the higher costs associated with such services. In Case 26/76, Metro SB-Großmärkte v. Commission ('Metro I'), 1977 E.C.R. 1875, ¶ 21, the Court acknowledged that in selective distribution systems price competition is not emphasized either as an exclusive or, indeed, as a principal factor. Thus, while price competition cannot be eliminated, it does not constitute the only form of competition or that to which absolute priority must in all circumstances be accorded.

authorized distributors remain consistent with the selective distribution system, as well as with the efficient operation of the different distribution channels. Sales restrictions to unauthorized dealers continue to be covered by the VBER, and, additionally, recent EU case law on trademark allows manufacturers to tackle sales to and from dealers outside the network of selected distributors more effectively.

C.1 *Quality Standards Requirements*

From the outset, it is important to recall that qualitative requirements that authorized dealers must meet in order to be admitted to the selective distribution network fall, in principle, outside Article 101(1) TFEU for lack of anti-competitive effects,[179] provided that the following conditions are satisfied:

- First, the nature of the product in question must necessitate a selective distribution system in the sense that such a system must constitute a legitimate requirement, with respect to the nature of the product concerned, to preserve its quality and ensure its proper use.[180]
- Second, resellers must be chosen on the basis of objective criteria of a qualitative nature that are set forth uniformly for all and made available to all potential resellers and are not applied in a discriminatory manner.

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[179] *See, e.g.*, Case T-88/92, Groupement d'achat Édouard Leclerc v. Commission, 1996 E.C.R. II-1961.

[180] Paragraph 185 of the Vertical Guidelines indicates that the case is strongest for new products, complex products, products whose qualities are difficult to judge before consumption (so-called experience products) or whose qualities are difficult to judge even after consumption (so-called credence products). However, promotional investment by a brand owner does not in itself justify selective distribution. *See Groupement d'achat Édouard Leclerc*, 1996 E.C.R. II-1961, ¶117. EU case-law generally concerns the following products: technical complex products, such as cars, *e.g.*, *BMW*, 1975 O.J. (L 29) 1, cameras, *e.g.*, *Kodak*, 1970 O.J. (L 147) 24, computers, *e.g.*, *IBM Personal Computers*, 1984 O.J. (L 118) 24, and clocks and watches, *e.g.*, *Omega Watches*, 1970 O.J. (L 242) 22, that requires specialist sales staff and after-sales services. However, exemptions are possible within each category. For example, the ECJ has previously questioned whether mass-produced watches are of such a nature that they could justify selective distribution. *See* Case C-31/85, ETA Fabriques d'Ebaucher SA v. DK Investment SA, 1985 E.C.R. 3933, ¶ 16. Further products include those for which brand image or the aura of luxury is of the essence, like perfumes and luxury cosmetics, *e.g.*, 1996 E.C.R. II-1961, diner services, *e.g.*, *Villeroy & Boch*, 1985 O.J. (L 376) 15, and gold and silver jewelry, *e.g.*, *Murat*, 1983 O.J. (L 348) 20. Here it is necessary to assess the need for the producer to preserve the image of its brand as well as the need to safeguard the image of exclusivity and prestige of the product.

- Third, the criteria set forth must not go beyond what is necessary in accordance with the principle of proportionality.[181]

The question as to whether the above conditions are fulfilled requires an objective assessment that takes the interests of consumers into account; the selective distribution system must ultimately enhance competition and, consequently, counterbalance its inherent restrictions on competition, particularly with respect to price.

C.1.a. *Restrictions on Authorized Dealers' Use of the Internet to Sell*

Authorized dealers within a selective distribution system should be free to sell, *both actively and passively*, to *all end users* with the help of the internet.[182] Therefore, while passive selling must be permitted regardless of the distribution network, restrictions on active selling, like those discussed above, are prohibited in the context of selective distribution.[183] The Vertical Guidelines provide some guidance about restrictions on authorized dealers, such as physical shop requirements, quality standards requirements on websites, and restrictions concerning the use of third party platforms.

Outright Ban/*de facto* Prohibition. As noted, authorized dealers within a selective distribution system should be free to sell, *both actively and passively*, to *all end users* on the

[181] *See L'Oréal*, 1980 E.C.R. 3775, ¶¶ 15, 16; *Metro I*, 1977 E.C.R. 1875, ¶¶ 20, 21; *AEG-Telefunken AG*, EUR-Lex CELEX LEXIS 61982J0107, ¶ 35; Case T-19/91, Vichy v. Commission, 1992 E.C.R. II-415, ¶ 65.
[182] *See* Vertical Guidelines, *supra* note 32, ¶ 56.
[183] Article 4(c) of the VBER prohibits the combination of exclusive and selective distribution within the same territory where the supplier operates selective distribution, because that would lead to a hardcore restriction on passive and active selling by the dealers. Such cumulative restrictions may be exempted if active selling in other territories is not restricted. *Id.* ¶ 152. The supplier may nonetheless commit itself to supplying only one dealer or a limited number of dealers in a particular part of the territory where the selective distribution system is applied. *Id.* ¶ 57). For instance, in its *Omega* decision, *Omega Watches*, 1970 O.J. (L 242) 22, the Commission allowed Omega to limit the number of watch retailers per town or suburb based on the local population and presumed wealth. The quantitative restriction ensured that each retailer had sufficient financial incentives to invest in promotion activities. See the exception discussed above in cases where the manufacturer launches a new brand.

internet.[184] This means that an outright ban to use the internet as a method of marketing products, or a *de facto* prohibition to that effect, would invariably be considered a hardcore restriction.[185]

The Commission's current approach has evolved significantly since its earlier decisions,[186] and the prohibition of internet sales is also fairly well-established in the EU case law. In fact, in a recent case, the ECJ held that a contractual clause prohibiting (even *de facto*) the internet as a method of marketing has, at the very least, as its object the restriction of passive sales to end users who wish to purchase online and are located outside the physical trading area of the relevant member of the selective distribution system.[187]

In exceptional circumstances, a prohibition to use the internet may be objectively

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[184] *See* Vertical Guidelines, *supra* note 32, ¶ 56. Interestingly, the old guidelines stated that the supplier could not reserve sales and/or advertising for itself over the internet. *Id*. ¶ 51.

[185] *See, e.g*., Press Release, European Commission, IP/01/713, Commission Approves Selective Distribution System for Yves Saint Laurent Perfume (May 17, 2001) (Press release concerns an outright ban on internet sales. At that time, the Commission seemed to accept that retailers could *request* B&W Loudspeakers to do distant selling and that B&W Loudspeakers could only *refuse* such requests in writing and on the basis of the need to maintain the brand image and reputation of the products –an approach now rejected by the ECJ in *Pierre Fabre*); Press Release, European Commission, IP/02/916, Commission Clears B&W Loudspeakers Distribution System After Company Deletes Hard-Core Violations (June 24, 2002) (concerning an outright ban on internet sales); *see also* Case B 3-123/08, CIBA Vision Vertriebs GmbH (Sept. 25, 2009) (concerning anti-competitive agreements on the exclusion of internet trading and, in particular, the prevention of the eBay trade in certain contact lenses); *Pierre-Fabre*, 2011 E.C.R. I-0000 (where the ECJ held that the requirement that a qualified pharmacist must be present at a physical sales point may result in *de facto* prohibition of the use of the internet for those sales by authorized distributors); Conseil de la Concurrence [French Competition Board], Decision No. 06-D-28 Concerning Hi-Fi and Home Cinema Equipment, ¶ 32 (Oct. 5, 2006) (relating to practices in the high-end electronic products sector).

[186] For instance, in the Dec. 12, 2001 decision in *Yves Saint Laurent Parfums*, the Commission considered that due to the nature of the products, an outright ban to sell by mail was not an appreciable restriction on competition insofar as "*supplying the products under optimum conditions presupposes direct contact between customers and a sales staff that is capable of suggesting a choice between the various products and various brands, taking account of the personal requirements of each consumer.*" 1992 O.J. (L 012) 24 (approach superseded by a later EC decision in 2001). At the national level, the Belgian Supreme Court was of the same view in 2002 in Makro v. Beauté Prestige International AO, ARR.CAS (Oct. 10, 2002). The Belgian Supreme Court held that even an outright prohibition of internet sales could be permissible to the extent that such prohibition is "objectively justified." Although the Supreme Court did not provide further clarification as to the concept of "objective justification," it indirectly upheld the rather broad interpretation adopted by the Liège Court of Appeal, according to which the restriction on internet sales concerning luxury perfumes and cosmetics was objectively justified by the nature of these products, requiring personal professional advice and therefore methods of sale that cannot be assured over the internet. The Supreme Court rejected the arguments of the appellants that restrictions on internet sales can only be imposed on qualitative criteria regarding the use of the internet. Such an approach would be in contrast with the current EU rules.

[187] *Pierre Fabre*, 2011 E.C.R. I-0000, ¶ 54; *see also Cosmetics,* Decision No. 07-D-07, ¶ 97.

necessary, and, as a result, Article 101(1) would not apply.[188] Certain justifications, such as the need to provide individual advice to the customer to ensure the correct use of products or the need to maintain a prestigious image, have, however, been rejected.[189] Undertakings may nonetheless plead an efficiency defense under Article 101(3) on an individual basis.

While a prohibition of the use of the internet is not permitted, the supplier may still require quality standards for the use of the internet to sell products, just as the supplier may require quality standards for a shop or for advertising/promotion in general.[190] Thus, authorized distributors who are already part of the network may have to comply with specific requirements if they want to sell online; furthermore, pure online players may eventually be refused access under the new rules, in principle.[191]

Brick-and-mortar Shop. Of the quality standards requirements, the most powerful restriction is that distributors may be required to have one or more brick-and-mortar shops or

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[188] In general, hardcore restrictions may be objectively necessary in exceptional cases for an agreement of a particular type or nature; an example is the need to ensure that a public ban on selling dangerous substances to certain customers for reasons of safety or health is respected. Vertical Guidelines, *supra* note 32, ¶ 56.

[189] *See Pierre Fabre,* 2011 E.C.R. I-0000, ¶¶ 44, 46; Case C-322/01, Deutscher Apothekerverband v. 0800 DocMorris NV and Jacques Waterval, 2003 E.C.R. I-14887, ¶¶ 106-107, 112; Case C-108/09, Ker-Optika v. ÁNTSZ Dél-dunántúli Regionális Intézete, 2010 E.C.R. I-0000, ¶ 76. However, according to Advocate General Mazák in his *Pierre Fabre* opinion, there may exist situations where the ban on internet sales is "*objectively justified,*" even in the absence of national or Community regulation; for instance, a ban may be justified when certain goods or services may be inherently unsuitable for sale via the internet (e.g. either due to the nature of those goods/services or the customers to whom they are sold). Advocate General Mazák added that private voluntary measures, if included in an agreement, may fall outside the scope of Article 101(1) TFEU, provided the limitations imposed are appropriate in light of the legitimate objective sought and do not go beyond what is necessary in accordance with the principle of proportionality. *See Yves Saint Laurent Parfums*, 1992 O.J. (L 012) 24 (an outright ban to sell by mail was not an appreciable restriction of competition insofar as "supplying the products under optimum conditions presupposes direct contact between customers and a sales staff that is capable of suggesting a choice between the various products and various brands, taking account of the personal requirements of each consumer.").

[190] Vertical Guidelines, *supra* note 32, ¶¶ 52(c), 54.

[191] If a dealer who fulfills the admission criteria is refused admission, then the selective distribution system may be legally unenforceable, the Commission may make a decision and the parties may be liable for fines; however, the Commission does not have the power to order the party to enter into a contractual relationship. The parties must be free to exercise their own choice among the different potential courses of action that would bring their behavior into compliance with the Treaty. *See* Cases T-24 and 28/90, Automec v. Commission (Automec II), 1992 E.C.R. II-2223, 5 C.M.L.R. 431 (1992).

showrooms as a condition for becoming a member of the manufacturer's network of authorized distributors, and, therefore, before they can actually sell the manufacturer's product online.[192]

Thus, pure-play online retailers can, in principle, be kept outside the distribution network of authorized dealers, and sales to such resellers can also be prohibited.[193] However, the exclusion of pure online players must ultimately be reconciled with the established EU case law, whereby qualitative criteria cannot have the object or effect of excluding *a priori* modern distribution systems.[194] As a result, manufacturers are required to carry out a case-by-case assessment of the restriction(s) they intend to introduce in each circumstance.[195] Where appreciable anti-competitive effects occur, such as preventing access to the market by new

[192] Vertical Guidelines, *supra* note 32, ¶ 54. EU case-law also provides some insight on distance selling. For instance, in *Grundig II*, Commission Decision 94/29/EC, of 21 December 1993 Concerning Grundig's EC Distribution System, 1993 O.J. (L 20) 15, mail order companies were admitted to the distribution network for the first time, provided they had distribution facilities, i.e. premises (a specialist department within a department-store-type retail business, or other distribution facilities specializing in such equipment) that were comparable to specialized retail shops and were widely represented in the relevant distribution country. The Commission held that this requirement did not fall within the scope of Article 81(1), because the complex nature of the products sold, namely consumer electronic goods, justified a requirement that dealers had premises where appropriate advice could be sought. *See also* Press Release, European Commission, IP/01/713, Commission Approves Selective Distribution System for Yves Saint Laurent Perfume (May 17, 2001) ("In [the old] guidelines the Commission stressed the importance of the internet for the competitiveness of the European economy and encouraged widespread use of this modern means of communication and marketing. In particular it believes that a ban on internet sales, even in a selective distribution system, is a restraint on sales to consumers which could not be covered by the 1999 regulation. The YSLP system satisfies the exemption conditions set by this regulation. YSLP has applied selection criteria authorizing approved retailers already operating a physical sales point to sell via the internet as well.").

[193] *See, e.g.*, Depotkosmetik im Internet, Bundesgerichthof [BGH] Federal Court of Justice] Nov. 4, 2003, 2002 KZR 2, WuW/E DE-R1203-1205 (Ger.); Bijourama v. Festina France SAS, Paris Court of Appeal Oct. 16, 2007, 2006 RG 17900, 2007 JurisData 344770; PMC Distribution v. Pacific Creation, Paris Court of Appeal Apr. 18, 2008, 2007 RG 04360 (admitting that a manufacturer could limit the ability of brick-and-mortar stores, which had been opened for a maximum of one year, to sell online).

[194] In *AEG-Telefunken AG*, the Court held that, "Nor is the attitude […] mentioned in the [Commission] decision acceptable either in so far as, […] it presupposes that the new forms of distribution are not, by their very nature and type of organization, capable of satisfying the specialist trade conditions. […] A manufacturer who has introduced a selective distribution system cannot therefore absolve himself, on the basis of an a priori evaluation of the characteristics of the various forms of distribution, from the duty of checking in each case whether a candidate for admission satisfies the specialist trade conditions." *AEG-Telefunken AG*, EUR-Lex CELEX LEXIS 61982J0107, ¶¶ 74-75. In its decision, the Commission actually found that the deciding factor for AEG was not whether the sales outlets possessed the necessary technical expertise or suitable premises for selling AEG products, but whether they might endanger the high-price policy pursued by AEG.

[195] *See* Case C-31/85, ETA Fabriques d'Ebaucher SA v. DK Investment SA, 1985 E.C.R. 3933, ¶ 16.

distributors capable of adequately selling the products in question,[196] the Commission may withdraw the benefit of the VBER or the conditions of Article 101(3) TFEU may not be fulfilled (and fines may then be imposed). Particularly when used throughout a market, the physical point of sale requirement can effectively bar consumers from the benefits of products offered by online-only distributors.[197]

In general, changes to the selection criteria are possible under the VBER in order to include having a brick-and-mortar shop, even when such a requirement was not originally in place, except where such change has the object of either directly or indirectly limiting online sales by the distributors[198] or punishing a distributor for selling successfully over the internet, particularly in territories where the supplier/other distributors charge higher prices.

Restrictions Relating the Quality of the Website. While concerns for brand image do not justify a ban on the use of the internet, the manufacturer may legitimately require its authorized distributors to comply with requirements relating to the quality of the website. For instance, the following requirements may be deemed acceptable: creating a dedicated webpage within an online store such that products are displayed on the distributors' websites in a way that avoids any confusion with competitors' products;[199] requiring prior approval of information,

[196] It is true that the VBER exempts selective distribution regardless of the nature of the product concerned and the nature of the selection criteria. However, where the characteristics of the product do not require selective distribution or do not require the applied criteria, *particularly the requirement for distributors to have one or more brick-and-mortar shops or showrooms or to provide specific services*, such a distribution system does not generally bring about sufficient efficiency enhancing effects to counterbalance a significant reduction in intra-brand competition. Vertical Guidelines, *supra* note 32, ¶ 176.

[197] When parallel networks of selective distribution exceed a certain market threshold (above 50%), the Commission may consider withdrawing application of the VBER, specifically when the selective distribution systems at issue prevent access to the market by new distributors capable of adequately selling the products in question, especially price discounters or online-only distributors offering lower prices to consumers, which limits distribution to the advantage of certain existing channels and to the detriment of final consumers. *Id*. ¶¶ 176, 178-179).

[198] *Id*. ¶ 54.

[199] *Festina France,* Decision No. 06-D-24.

banners, logos, colors and formatting related to the products;[200] respecting the graphical requirements of the supplier, and including a link to the supplier's website[201] or to other distributors' websites[202].

On the other hand, the following requirements may be deemed excessive: creating a website exclusively for the sale of products with professional (e.g. pharmaceutical) counseling; providing a payment point reserved for the products at issue; and stipulating excessive specifications for the presentation of the product, such as descriptions and compulsory pixel resolution for pictures.[203] One can reasonably argue that such requirements raise the costs for entering the online channel and ultimately discourage online selling.

Similarly, the mandatory translation of a website into foreign languages may be considered an excessive requirement aimed at dissuading the use of a website.[204] One may recall that the opposite issue arises in the context of exclusive distribution, because the parties must limit the use of different language tools to the extent that such language tools may lead to active selling (which cannot be restricted in the context of selective distribution).

Use of Third Party Platforms. While some distributors may simply set up their own website to sell online, others may find it convenient to form agreements with third party platforms, such as online market places or auction sites, in order to benefit from both the

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[200] *Id*.
[201] *Hi-Fi*, Decision No. 06-D-28.
[202] Vertical Guidelines, *supra* note 32, ¶ 52(a).
[203] *See Cosmetics*, Decision No. 07-D-07.
[204] *Id*. ¶¶ 121-123. During the consultation process that lead to the adoption of the new rules by the Commission, it was discussed whether members of a selective distribution system could be prevented from setting up websites in a language different from that spoken in their authorized place of establishment, based on the fact that the manufacturer may legitimately restrict the place of establishment of its authorized distributors, without losing the benefit of the VBER. The subtle question essentially focused on whether the term "place of establishment" could be taken, through a broad interpretation, to encompass the place from which internet sales services are provided. The "answer" to that question is indirectly evidenced in the actual text of the Vertical Guidelines, which states that "the use by a distributor of its own website cannot be considered to be the same thing as the opening of a new outlet in a different location." Vertical Guidelines, *supra* note 32, ¶ 57.

consumer traffic generated by such platforms and additional services (like interface design, payment systems, customer care and international web marketing). Online marketplaces, including online auction platforms, are heavily used by consumers, so it follows that distributors, particularly small ones, often need to offer their products through these gateways.[205]

The Vertical Guidelines state that use of third party platforms by authorized distributors shall only be done in accordance with the standards and conditions agreed upon between the supplier and its distributors for the distributors' use of the internet.[206] However, the language used in the Vertical Guidelines may be prone to different interpretations. In particular, it is not clear whether "the standards and conditions" only relate to quality issues, such as those discussed above for the distributor's website, or whether they can go as far as to prohibit the use of *certain* online channels (e.g. all auction sites) or third party platforms (e.g. eBay or Amazon), provided that such standards and conditions do not amount to a *de facto* prohibition of *all* internet sales.[207]

The Vertical Guidelines appear to suggest that the least restrictive solution is the one preferred. In fact, the example provided therein indicates that, "where the distributor's website is hosted by a third party platform, the supplier may require that customers do not visit the distributor's website through a site carrying the name or logo of the third party platform."[208]

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[205] Small companies may save significant resources using intermediary services, because they then do not have to maintain websites. Additionally, small companies that sell through their own website are likely to have less traffic coming to and from the site than intermediaries do. As a result, consumers are more likely to find the individual company's products if they are sold through intermediaries.

[206] Vertical Guidelines, *supra* note 32, ¶ 54.

[207] The ECJ was recently called to consider whether a contractual clause de facto prohibiting "all forms of internet selling" can be justified by a legitimate aim. *See Pierre-Fabre*, 2011 E.C.R. I-0000, ¶ 35. The ECJ's ruling clarified only that a ban of *all* internet sales is a hardcore restriction on passive selling, but did not address the issue as to whether *certain forms* of internet sales may be prohibited. That leaves the question open for further debate.

[208] Vertical Guidelines, *supra* note 32, ¶ 54. The example appears to suggest that the manufacturer cannot go as far as banning a specific online platform, but they can require a technical solution whereby customers do not access the distributor's website through a site carrying the name or logo of the third party platform. An example of such a technical/commercial solution was the cooperation between Amazon.com and Borders.com (now terminated and subject to an antitrust dispute in the U.S.). Borders had previously, and unsuccessfully, attempted to operate its own website. Under the agreement, Borders' website addressed directs shoppers to what is known as a "mirror website,"

If so, the "standards and conditions" would likely concern quality requirements, such as presentational aspects or the type/quality of services that the "hosting platform" should provide to customers.

However, at the national level, there are examples that support a different solution to this issue. For instance, two German courts recently adopted a rather lenient approach towards restrictions on internet sales via auction websites.[209] According to the German courts, the manufacturer may legitimately prohibit its distributors from reselling its products through auction websites (such as eBay), insofar as such a restriction would amount to a quality requirement related to internet sales, while distributors remain free to sell online using other means than auction websites. Although these judgments are not undisputed in Germany,[210] other

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a site hosted by Amazon. Amazon provided, *inter alia*, the inventory listing, website content, customer service, sales, etc., to Borders. The agreement's commercial terms were quite peculiar, because the books purchased through the mirror site were sold and shipped by Amazon, and Borders received a commission for each book sold. Amazon would select the books offered, their prices, and the terms of the sales.

[209] *See* Amer Sports, Higher Regional Court of Munich July 2, 2009, U. [K] 4842/08 (unreported); Scout-Schulranzen, Higher Regional Court of Karlsruhe Nov. 25, 2009, 6 U. 47/08 (unreported). For instance, the Higher Regional Court of Munich recently allowed Amer, a manufacturer of sports products, to prohibit its distributors from reselling its products through auction websites, such as eBay. The prohibition of Amer's customers from reselling to undertakings that themselves used this form of distribution (i.e. a restriction on indirect sales through these websites) was found to be equally lawful. Amer argued that such a restriction on its distributors and their respective customers was merely a quality requirement related to internet sales, which was comparable to quality requirements that may be imposed in relation to brick-and-mortar sales as well as advertising and promotional activities. The circumstances of the case are quite singular. Amer did not have a selective distribution system in place, and, in fact, its distributors were free to sell via the internet using other means than auction websites, a circumstance that may have convinced the Court that the prohibition at stake was not a total ban on internet sales. A few months later, the Higher Regional Court of Karlsruhe followed the same line of reasoning in a case concerning the distribution of Scout's satchels and backpacks on eBay. Unlike in the *Amer* case, though¸ Scout had a selective distribution system in place. Interestingly, the Karlsruhe Court further clarified that the validity of a restriction to distribute through internet auction platforms is not only limited to luxury products, but could equally be imposed in relation to branded products that manufacturers consider to be top-of-the-line products on the basis of their objective characteristics and for which they lay down qualitative selective distribution criteria aiming to adequately present the whole range of products, the provision of competent advice and the maintenance of the brand image. *See* Maria Held, *The More Lenient Approach of German Courts Towards Prohibition of Distribution via Internet Auction Platforms - Recent Developments*, 31 E.C.L.R. 9, 343-348 (2010).

[210] However, the judgments of the Higher Regional Courts of Munich and Karlsruhe are not undisputed. In fact, the District Court of Berlin held that an overall prohibition of selling through eBay was not admissible. The two cases also concerned the distribution of school bags through auction websites. *See* District Court of Berlin July 24, 2007, 16 O. 412 Kart; District Court of Berlin August 5, 2008, 16 O. 287. According to the District Court of Berlin, a prohibition is admissible only if quality standards -that might only exist for premium and luxury products- are

courts in Europe have taken a similar approach.[211] Thus, this issue is probably one that may warrant further specific guidance from the Commission and/or the EU Courts in order to avoid inconsistent solutions at the EU and national levels.

C.1.b. *Restrictions Relating to Services to Customers and Quantitative Measures*

The manufacturer may also seek to impose restrictions on the services to be provided to online customers or restrictions that ensure the efficient operation of the distribution channels within its network. For instance, the manufacturer may be concerned about free-riding issues between different distribution channels within the network of distributors. These requirements cannot, however, unreasonably limit the distributor's use of the internet to sell[212] and, ultimately, its access to a greater number and variety of customers, particularly end users wishing to purchase online who are located outside the physical trading area of the relevant member of the selective distribution system.[213]

Requirements to Provide Specific Services to Online Customers. The Vertical Guidelines essentially acknowledge that there are inherent qualitative differences in retailer

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disregarded. Moreover, the German Federal Supreme Court has held that a general prohibition of marketing products on the internet does not comply with the requirements of antitrust laws. *See Depotkosmetik im Internet*, 2002 KZR 2, WuW/E DE-R1203-1205; *see also* Case B 3-123/08, CIBA Vision Vertriebs GmbH (Sept. 25, 2009), *available at* http://www.bundeskartellamt.de/wDeutsch/download/pdf/Kartell/Kartell09/B3-123-08.pdf; Tobias Caspary, *Swimming Against the Zeitgeist*, E.C.L.R. 3, 125-130 (2010). On September 25, 2009, the German Federal Cartel Office (FCO) levied a fine of Euro 11.5 million against contact lens provider CIBA Vision GmbH (CIBA) for fixing minimum resale prices and restricting internet and wholesale sales of its products. CIBA employees systematically monitored retail prices for CIBA contact lenses charged by internet retailers to consumers; furthermore, CIBA requested its retailers to commit not to sell certain CIBA contact lenses via the internet, and they also prevented sales via eBay by asking eBay to delete any mention of its products on eBay's website. *See* Tobias Caspary, *Swimming Against the Zeitgeist*, E.C.L.R. 3, 125-130 (2010) (provides a comment on the *CIBA* case).

[211] In the *Cosmetics* case, some of the conditions regarding the quality of the distributor website indirectly prevented distributors from using certain third-party platforms. *See Cosmetics*, Decision No. 07-D-07. In particular, the French Competition Authority agreed that third-party platforms that act as intermediaries raised serious issues in terms of vendor identification and product authenticity, and therefore concluded that the fears of illegal sales (*i.e.*, of counterfeit products or of original products sold by vendors who are not licensed by the selective distribution network) justified the exclusion of this sales channel, until platforms could provide additional guarantees concerning the quality and the identity of online vendors.

[212] Interestingly, requiring the distributor to insert a message in its website recommending that consumers buy from a physical outlet was considered excessive. *See id*. ¶ 116.

[213] *See, e.g.*, *Pierre-Fabre*, 2011 E.C.R. I-0000; *Cosmetics*, Decision No. 07-D-07.

characteristics between e-commerce and traditional channels. While similar qualitative criteria for selective distribution across both forms of distribution may not be feasible for certain requirements, the criteria for online sales must nevertheless be "overall equivalent" (meaning that the criteria must pursue the same objectives and achieve comparable results) to those imposed on brick-and-mortar shops. If the requirements fail to be "overall equivalent," then they would likely be considered hardcore restrictions.[214]

For instance, in order to ensure timely delivery of contract products, a supplier may require that products be delivered instantly for offline sales, but an identical requirement clearly cannot be imposed for online sales. The supplier may, however, specify certain practicable delivery times for such sales.

Similarly, specific requirements may have to be formulated for an online after-sales help desk, such that the costs for pre-sale assistance, application of secure payment systems,[215] and customer returns are covered. For instance, such a help desk could answer any questions asked on-line by consumers within a short period of time (but not in real time or outside the opening hours of brick-and-mortar shops), eventually in the languages of all the countries where the distributor delivers.[216] Conversely, requirements like translating the website into foreign languages or making sales only to customers who have webcams, so the distributor can interact with the customer seeking advice, may be deemed excessive.[217]

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[214] Vertical Guidelines, *supra* note 32, ¶ 56. One must further recall that where the characteristics of the product do not require the applied criteria, then the restriction, like a restriction requiring provision of specific services, would likely fall outside the scope of the VBER, or the conditions of Article 101(3) TFEU may not be fulfilled.

[215] *Id.* ¶ 56; *see* EUROPEAN COMMISSION, XXVTH COMPETITION REPORT 1995: *SONY PAN-EUROPEAN DEALER AGREEMENT* 135 (1995) (where the Commission required Sony to oblige authorized mail order resellers to offer enhanced services (home delivery and the grant of a non-binding trial period for mail order purchasers) to consumers to justify their inclusion in the selective distribution system).

[216] *See Cosmetics*, Decision No. 07-D-07.

[217] *See id*. *But see Hi-Fi*, Decision No. 06-D-28 (admitting that for the most sophisticated products, the customer must be given the option to test the product in a physical outlet before purchasing it via the internet).

Quantitative Measures. While quality requirements generally address a manufacturer's concerns about brand image, the manufacturer may impose certain restrictions to ensure the efficient operation of, and consistency between, the distribution channels within its selective distribution network. Generally, this can be done by regulating volume sales or certain cost variables.

In particular, requiring a distributor to limit the proportion of overall sales made over the internet ("volume caps"), or requiring a distributor to pay a higher price for products to be resold online than for products intended to be resold off-line ("dual pricing"), are both considered hardcore restraints that have the sole purpose of limiting the development of the online channel.[218]

Volume caps are by definition dissuasive measures; however, rather than limiting their online sales,[219] the manufacturer could instead ensure the efficient operation of the offline channel by imposing a less restrictive solution, such as requiring its distributors to sell off-line at least an absolute amount (in value or volume).[220]

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[218] *See* Vertical Guidelines, *supra* note 32, ¶ 52.

[219] The amount should be determined on the basis of objective criteria, such as the buyer's size in the network or its geographic location. *Id*. ¶ 52(c). Interestingly, prior to the adoption of the current EU rules, the German Federal Supreme Court adopted a relatively lenient approach. *See Depotkosmetik im Internet*, 2002 KZR 2, WuW/E DE-R1203-1205, *available at* http://dejure.org/dienste/internet2?juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=27989&pos=0&anz=1 (in German). The case concerned the right by a perfume manufacturer to terminate the distribution contract when total online sales of a distributor reached a certain percentage of all sales or when the total sales traded through e-commerce exceeded the sales traded by the brick and mortarbrick-and-mortar business. The Federal Supreme Court held that this clause was admissible, because it is in the manufacturer's interest to protect its brand products against distribution channels that might be in conflict with the aura of exclusivity of the brand product. Similarly, in *Yves Saint Laurent Parfums*, the parties agreed to a minimum purchase requirement in order to maintain continuous supplies and to allow Yves Saint Laurent Parfums to concentrate distribution on the cost effective retail outlets, which, consequently, rationalizes the spread of the costs associated with the distribution of its products and with the provision of assistance to retail outlets. *See Yves Saint Laurent Parfums*, 1992 O.J. (L 012) 24. In particular, such an obligation was a means of ensuring, on the one hand, that the costs borne by the manufacturer will be covered by an adequate volume of business and, on the other, that the authorized retailer will contribute actively to enhancing the brand through customer service that is in line with the reputation of the contract products.

[220] The combination of purely qualitative selection criteria with the requirement to achieve a minimum amount of off-line sales is an indirect form of "quantitative" selective distribution, which is less likely to produce net negative

Dual pricing is generally considered a hardcore restriction as well. However, requiring distributors to pay a price linked to the specific distribution channel may be necessary and can fulfill the conditions of Article 101(3) TFEU[221] in those instances when selling online leads to substantially higher costs for the manufacturer than offline sales or when cross-border services may need to be provided.[222]

For instance, when offline sales include home installation by the distributor but online sales do not, the latter may lead to more advice to customers (or complaints from them) and warranty claims for the manufacturer, such that different prices may be justified to cover these higher costs.[223] In that context, a relevant factor to take into account is to what extent the restriction is likely to limit internet sales.[224]

On the other hand, the supplier may offer its distributors a fixed fee in order to ensure the efficient operation of their physical outlets, or they may impose the payment of a fee from the authorized distributors (not necessarily online) that engage in cross-border sales.

In particular, a fixed fee can be agreed upon, for instance, to support the services offered

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effects if such an amount does not represent a significant proportion of the dealer's total turnover achieved with the type of products in question and if it does not go beyond what is necessary for the supplier to recoup its relationship-specific investment and/or realize economies of scale in distribution.

221 Vertical Guidelines, *supra* note 32, ¶¶ 52(d), 64; *see, e.g.* Case C-501/06 P, GlaxoSmithKline v. Commission, 2009 E.C.R. I-9291.

222 Vertical Guidelines, *supra* note 32, ¶ 64.

223 In *Groen Trend & Schouten Keukens* v. *AEP Home Products*, nr. 79005/H.A. Z.A. 06-716, L.J.N. BB7225 (2007), *available at* http://www.wetboek-online.nl/jurisprudentie/ljnBB7225.html, a Dutch court ruled that the application of different pricing and warranty conditions by a supplier of branded kitchen appliances based on whether sales were made online or in a brick-and-mortar shop, was not contrary to the old Block Exemption Regulation, *supra* note 92, and (former) Article 81 EC, Consolidated Version of the Treaty Establishing the European Community, Nov. 10, 1997, 1997 O.J. (C 340) 208. In particular, the Dutch court upheld the supplier's argument that internet retailers provided less added value than specialist shops, because, contrary to specialist shops, internet retailers sold the kitchen appliances to consumers without providing expert advice and without ensuring the proper installation of the appliances at the customer's home. This resulted in increased costs for the supplier, who often needed to advise consumers on the use and maintenance of the appliances and to solve problems caused by inaccurate or faulty installation of appliances sold via the internet.

224 The assessment would likely focus on whether different prices that distributors have to pay in the two channels reflect a realistic assessment of the extra cost(s) that the two dealers (offline and online) would bear in completing the sale and whether the price difference is set at an excessive level in order to deter online sales. *See* Case T-67/01, JCB Service v. Commission, 2004 E.C.R. II-49.

by brick-and-mortar shops or different marketing/demonstrative initiatives.[225] Moreover, when a distributor makes a sale outside "its" territory, like via the internet, that distributor may be required to pay the distributor located in the territory of "destination" a fee based on the cost of the services (e.g., warranty repairs or product substitution) performed by the latter, including a reasonable profit margin.[226] Such a restriction may be justified if it is shown to be necessary to remedy free-riding between authorized distributors located in different territories, rather than inducing the distributor not to sell to customers located therein. On the other hand, profit pass-over obligations, namely payments that are unrelated to costs effectively borne by the distributor located in the territory of destination, are normally prohibited.[227]

C.2 *Restrictions of Sales to/by Unauthorized Dealers*

Manufacturers of well-known brands would do all they can to prevent having unauthorized resellers obtain their products for resale outside the official distribution network. The online channel is a major concern for manufacturers, because, they claim, consumers are more exposed to counterfeits and frauds, which ultimately damage the reputation and image of their brands. Under EU competition law, sales (including online sales) between authorized

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[225] Vertical Guidelines, *supra* note 32, ¶ 52(d). The two channels likely face different overhead and continuing costs. Each channel may even face different costs to provide similar services. For instance, while the cost to provide product information on a website is basically fixed (costs would not increase with the number of consumers visiting the website), a shop may likely incur higher/variable costs, particularly in certain periods of the year (holidays, back-to-school time, etc.). A variable fee that increases with the offline or online turnover would be prohibited, because this would indirectly amount to dual pricing.

[226] *See id.* ¶ 50 n.4 (If the supplier decides not to reimburse its distributors for services rendered pursuant to a Union-wide guarantee, under which all distributors are normally obliged to provide the guarantee service and are reimbursed for this service by the supplier, even in relation to products sold by other distributors into their territory, then this would be considered a prohibited restriction on the distributors' sales outside their territory); *JCB Service v. Commission*, 2004 E.C.R. II-49, ¶¶ 136-145 (the Court held that it was important to know whether the amount of the fee imposed on the exporting dealer was a realistic assessment of the cost of after-sales service that the recipient dealer would have to provide or whether it was set at an excessive level in order to deter exports); *see also* SPEA v. GCAP and Peugeot, B.O.C.C.R.F. (Sept. 21, 2004), *aff'd*, Cass. (Jan. 17, 2006) (the Paris Court of Appeal held that subsidies granted to dealers that were based close to frontiers and faced competition from cross-border agents and independent resellers were not anti-competitive).

[227] *See* Vertical Guidelines, *supra* note 32, ¶ 50.

dealers and *all end-users* cannot be restricted.[228] Sales restrictions *to* unauthorized dealers, however, continue to be covered by the VBER. In addition, recent EU case law on trademark allows manufacturers to more effectively tackle sales *to* and *by* unauthorized dealers in the context of selective distribution.

The VBER exempts the restriction of sales *to* unauthorized distributors "located"[229] in any territory where selective distribution is currently operated, and/or, as is now clarified, where the supplier does not yet sell the contract products.[230]

In practice, if the manufacturer operates selective distribution in one territory while using another type of distribution system in another territory, then it cannot restrict sales to unauthorized distributors located in the territory where the contract products are distributed under a different distribution system.

On the other hand, the new rules are innovative in that the manufacturer can now restrict sales to unauthorized dealers located in territories where it does not yet sell the contract product, namely territories where no "official" distribution occurs. In fact, such territories are now presumed to be reserved by the supplier to operate the selective distribution system. In essence, the manufacturer does not have to set up a full network of authorized distributors to cover the

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[228] VBER, *supra* note 94, art. 4(b), 4(c) (prohibiting respectively "the restriction of active or passive sales to end users by members of a selective distribution system operating at the retail level of trade, without prejudice to the possibility of prohibiting a member of the system from operating out of an unauthorised place of establishment" and "the restriction of cross-supplies between distributors within a selective distribution system, including between distributors operating at different level of trade"); Vertical Guidelines, *supra* note 32, ¶¶ 56, 58, 63. With regard to cross-supplies between authorized dealers, *see, e.g.*, Press Release, European Commission, IP/02/915, Commission Clears Loudspeakers Distribution System After the Company Deletes Hard-Core Violations (June 24, 2004) (B&W Loudspeaker's distribution system contained several hard-core restrictions, including restrictions on cross supplies between authorized dealers and a prohibition on distant sales that included sales through the internet).

[229] As noted, under the e-commerce Directive 2000/31/EC, the "place of establishment" of a company providing services or products online is not the place at which the technology supporting its website is located or the place at which its website is accessible but *the place where it pursues its economic activity*. 2000 O.J. (L 178) 1. The concept of location of an online distributor for the purposes of EU competition law will have to be clarified by the Commission and EU Courts.

[230] Vertical Guidelines, *supra* note 32, ¶ 55; *see also* discussion on the concept of "exclusive reservation," *supra*.

whole EU territory based on the concern that, unless it does so, unauthorized online distributors "located" in a territory where the selective system is not currently operated may claim that they are entitled to obtain supplies.[231]

However, the ability to prevent parallel trade by unauthorized distributors in certain territories means that such dealers can be prevented from obtaining the products in the first place. If "unauthorized distributors" could be detected easily, then there would be no issue. But manufacturers and their distributors are not generally able to single out unauthorized distributors, and authorized dealers remain free to sell to *all* end-users, which includes both professional "end-users" and final consumers. Besides, under EU competition law, the manufacturer cannot impose restrictions on its distributors' customers;[232] this means that once the manufacturer sells the products, it loses control over them.

Still, the Vertical Guidelines acknowledge that the internet makes each distribution system, including selective distribution, more vulnerable; thus, the Vertical Guidelines allow suppliers to keep selected dealers from selling more than a given quantity of contract products to an individual end-user. However, the Vertical Guidelines do not attempt to make a best guess

[231] Arguably, the use of selective distribution (once established) is not necessarily called into question simply because the supplier chooses to use other distribution formats outside the EU or even in other parts of the EU. In Case C-376/92, Metro SB-Großmärkte GmbH & Co. KG v. Cartier (Cartier), 1994 E.C.R. I-15, the ECJ held that the German principle of "imperviousness" ("Liickenlosigkeit") does not apply under EU competition law and that it is not a requirement for the validity of a selective distribution system in the EU that resellers outside the EU should be prevented by the supplier from selling in the EU to unauthorized resellers. The judgment also suggests that there is no requirement on a supplier to use selective distribution in all parts of the EU in which it supplies its products. The Commission has previously approved systems established by multinational companies limited to a single Member State. On the other hand, the new provision in the Vertical Guidelines that introduces the concept of "exclusive reservation" may again raise the question of whether the principle of "imperviousness" does now apply under EU competition law.

[232] *But see Amer Sports*, U. [K] 4842/08 (where the Higher Regional Courts Munich found that the prohibition of Amer's customers from reselling to undertakings that themselves used online auction sites (i.e. a restriction on indirect sales through these websites) was lawful).

about what this quantity should be.[233] Though only indirectly, such a restriction seeks to prevent unauthorized dealers from sourcing all their product needs simply by acting as disguised end-users. Ultimately, though, re-sale by distributors' customers is an issue that EU competition law cannot, and probably should not even attempt to, properly address with regard to internal market considerations.

Enforcement of Trademark Rights. On the other hand, a recent development in EU case law on trademark rights is probably filling this gap, which, consequently, exacerbates the tension between IPRs and competition law. In fact, as though selective distribution is not safeguarded enough by EU competition law vis-à-vis unauthorized dealers, manufacturers may now rely on judicially-created trademark law remedies to further tackle commercialization of their products outside the official channel.

Specifically, in the recent *COPAD* judgment, the ECJ held that, in the context of a selective distribution system, a brand owner can rely on its trademark to prevent:

- its licensees and authorized dealers from supplying discount stores where such resale would impair the "aura of luxury" and prestigious image of the goods; and
- the subsequent resale of the goods *by* unauthorized dealers, where such resale would undermine the reputation of the branded goods.[234]

Thus, the judgment extends the right for manufacturers/brand owners to seek relief directly against unauthorized resellers, going beyond what it is currently allowed under EU

[233] Vertical Guidelines, *supra* note 32, ¶ 56. The Vertical Guidelines specify that such a requirement may have to be stricter for online sales if it is easier for an unauthorized dealer to obtain those products by using the internet. Similarly, it may have to be stricter for offline sales if it is easier to obtain them from a brick-and-mortar shop. The volume or threshold of suspicious sales is left open and will likely vary based on the circumstances. For instance, in the *Cosmetics* case, sales above a certain threshold had to be approved specifically by the manufacturer. *Cosmetics*, Decision No. 07-D-07.

[234] *See* Case C-59/08, Copad SA v. Christian Dior Couture SA, 2009 E.C.R. 2009 I-3421; *see also Amer Sports*, U. (K) 4842/08; *Scout-Schulranzen*, 6 U. 47/08.

competition law.

In fact, the ability for the supplier to prevent, under certain conditions, its authorized dealers from supplying discount stores conflicts with the EU competition law principle that authorized distributors shall remain free to sell to all end users. Moreover, whereas under EU competition law the manufacturer cannot impose restrictions on its distributors' customers,[235] the *COPAD* case law allows the manufacturer/brand owner to prevent the unauthorized seller from further selling[236] (as well as advertising[237]) the branded[238] goods when the subsequent commercialization outside the selective distribution system impairs the image of the goods.

Arguably, the scope of this judgment may need to be tested further in competition law cases in order to soothe the tension between IPRs and competition law and to mitigate unintended consequences. In essence, the risk exists that selective distribution systems may become *quasi* air-tight, which would ultimately frustrate EU competition law enforcement or, worse yet, pave the way for unjustified restrictions on competition.[239]

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[235] *But see Amer Sports*, U. (K) 4842/08 (the Higher Regional Courts Munich held that the prohibition of Amer's customers from reselling to undertakings that themselves used online auction sites (i.e. a restriction on indirect sales through these websites) was lawful).

[236] *Copad SA*, 2009 E.C.R. 2009 I-3421, ¶ 51 ("A licensee who puts goods bearing a trademark on the market in disregard of a provision in a license agreement does so without the consent of the proprietor of the trademark"). Thus, the manufacturer will not be held to have "consented" to the further commercialization of the products outside the selective distribution network (i.e. no exhaustion of trademark occurs). German Courts have held that if a distributor does not comply with a valid sales restriction, then brand owners can directly claim trademark infringement and prohibit sales by the reseller, even though no contractual relationship exists. *Amer Sports*, U. (K) 4842/08; *Scout-Schulranzen*, 6 U. 47/08.

[237] In the context of keyword advertising, the advertiser cannot rely on the exhaustion rule of Article 7 of the First Trademark Directive if there are circumstances in which use of that sign by the advertiser does not enable normally informed and reasonably attentive internet users, or enables them only with difficulty, to ascertain whether the goods or services referred to by the ad originate from the proprietor of that mark or from an undertaking economically linked to it or, on the contrary, whether they originate from a third party. *See* Case C-558/08, Portakabin Ltd, Portakabin B.V. v. Primakabin B.V., 2010 E.C.R. I-0000, ¶ 81.

[238] In his opinion in the *Pierre Fabre* case, AG Mazak referred to the *Copad* case by stating that, "While the case is based on trademarked goods, I believe this ratio could be extended in certain circumstances to non-branded goods and indeed services where the manner in which goods and services are presented will affect consumers' perception of their quality." 2011 E.C.R. I-0000, n.44 (citing *Copad SA*, 2009 E.C.R. 2009 I-3421).

[239] *See Consten and Grundig*, 1966 E.C.R. 299; *Tarrapin*, 1976 E.C.R. 1039; *Interflora*, EUR-Lex CELEX LEXIS 62009CJ0323, ¶ 57; *Copad SA*, 2009 E.C.R. 2009 I-3421, ¶ 22. In such instances, a possible defense against claims

C.3 *Restrictions on Online Advertising*

Due to its effectiveness and customer reach, online advertising is not only a powerful selling tool in the hands of manufacturers and distributors, but it is also perceived as a potential source of concern for brand image and reputation that manufacturers/brand owners seek to protect from unauthorized users.

Restrictions Relating to the "Quality" of Advertising. The manufacturer cannot prevent online advertising or promotion by its authorized distributors,[240] but it may legitimately require them to comply with quality requirements.[241] Essentially, the considerations concerning quality requirements with respect to the use of a website (see discussion above), namely the "presentational requirements," may also apply to the quality of advertising.[242] Similarly, restrictions on the use of third party platforms *to sell* may be transposed to equivalent restrictions on the use of intermediaries *to advertise and promote* products. In any event, manufacturers cannot prohibit the use of their brand or trademark by authorized distributors in online

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of trademark infringement is that the selective distribution agreements with distributors infringe the EU competition rules, because they aim to partition the internal market and exclude parallel traders. *See, e.g.*, Sportswear Spa & Anor v. Stonestyle Ltd., 2006 E.W.C.A. Civ. 380 (2006) (the parties settled before trial); Oracle America Inc v. M-Tech Data Ltd. & Anor, 2010 E.W.C.A. Civ. 997 (Aug. 2010), *appeal filed*, (reference to the European Court of Justice is possible). Besides, in some circumstances, even a party to an agreement (i.e. an authorized dealer) that infringes Article 101 TFEU may be able to claim damages from another party of the agreement (i.e. the manufacturer) for breach of Article 101 TFEU. *See* Case C-453/99, Courage v. Crehan, 2001 E.C.R. I-6297.

[240] However online advertising is to be considered (i.e. active or passive selling), restrictions on passive and active selling are in any event strictly forbidden in the context of selective distribution.

[241] An obligation to follow the manufacturer's instructions with regard to advertising does not appear to infringe Article 101(1) TFEU, provided that those instructions do not seek to regulate the advertising of prices or conditions of sale. *See, e.g.*, Case 86/82, Hasselblad v. Commission, 1984 E.C.R. 883, ¶¶ 47-49 ("The power conferred on the applicant by [clause 23 of] the dealer agreement to require a dealer to stop publishing announcements in the press, to cease other advertising activities and to refrain from repeating them is tantamount to a right of retroactive censorship which enables the applicant to prohibit dealers who are particularly active in the field of competition and prices, and more particularly those who import otherwise than through Victor Hasselblad's sole distributors, from advertising their activities); *see also AEG-Telefunken AG*, EUR-Lex CELEX LEXIS 61982J0107, ¶¶ 130-135.

[242] Examples include prior approval of information, banners, logos, colors and formatting related to the products; respecting the graphical requirements of the supplier, and including a link to the supplier's website or to other distributors' websites.

advertising or search engines (paid advertising as well as natural search[243]).

IPRs Remedies. Disputes in this area mainly concern trademark use by unauthorized third parties who advertise and sell branded products online. Manufacturers/brand owners are increasingly suing search engines and online marketplaces (rather than the trademark users), claiming that they should be held secondarily liable for trademark breaches committed by their users (i.e. the unauthorized trademark users).[244] Clearly, it is more effective for brand owners to deal with the gate keepers rather than to sue hundreds of unauthorized trademark users. In some instances, though, search engines and online marketplaces have also been sued for interfering with selective or exclusive distribution networks on the basis that these intermediaries benefit from advertising revenue and actively assist unauthorized dealers with their online advertising services.[245]

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243 It was noted above that restrictions on the use of corporate names and brands as keywords for natural search results (non-paid advertising) was "prohibited" in France. See *Cosmetics*, Decision No. 07-D-07, ¶¶ 124-13; *Festina France*, Decision No. 06-D-24, ¶¶ 88-96.

244 A service provider, such as a marketplace, is entitled to the "hosting defense" exemption from liability under EU law only to the extent that it confines itself to "providing an intermediary service, neutrally, by a merely technical and automatic processing of the data provided by its customers." If, by contrast, the service provider "plays an active role of such a kind as to give it knowledge of, or control over, those data," then it will lose the benefit of this exemption. An active role can be characterized, for instance, "where the operator has provided assistance to its customers which entails, in particular, optimizing the presentation of the offers for sale in question or promoting those offers." *See* Case C-324/09, L'Oréal SA v. eBay International AG, 2011 E.C.R. I-0000 (unpublished). Certain factors, like the mere fact that the referencing service is subject to payment, that the referencing service provider sets the payment terms or that it provides general information to its clients cannot have the effect of depriving the referencing service provider of the exemptions from liability under EU law, while the role played by the referencing service provider in the drafting of the commercial message that accompanies the advertising link or in the establishment or selection of keywords is relevant. Joined Cases C-236/08 to C-238/08, Google France SARL and Google (Google France) v. Louis Vuitton Malletier SA, 2010 E.C.R. I-2417.

245 *See, e.g.*, *Parfums Christian Dior*, General docket No: 200607799. Despite eBay raising the typical competition law defense that the selective distribution agreement was void and unenforceable, the court still held eBay liable for interfering with the selective distribution network. *See* CODE DE COMMERCE [C. COM.] art. L.442-6(I)(6) (Fr) (pursuant to the French Commercial Code, direct or indirect participation in the violation of a lawful selective or exclusive distribution network gives rise to the liability of the person involved). Similarly, when search engines or referencing services play an "active role" to the effect of losing the "hosting defense" exemption, they also run the risk of being held liable for interfering with selective or exclusive distribution networks. To give an example of the practical consequences, albeit in a very different context, Google agreed with the U.S. Department of Justice to forfeit US$500 million for allowing online Canadian pharmacies to place advertisements through its AdWords program that targeted consumers in the United States, which resulted in the unlawful importation of controlled and non-controlled prescription drugs into the U.S. According to the U.S. Department of Justice, the forfeiture

In addition to the foregoing considerations on the *COPAD* judgment, a final consideration is that the proprietor of the trademark is entitled, in principle, to prevent the use of the trademark, including its use in advertising,[246] by third parties if the use is likely to have an adverse effect on one of the traditional trademark functions:[247] (i) the function of indicating origin of the goods/services in question,[248] (ii) the advertising function,[249] and (iii) the investment function[250].

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represents the gross revenue received by Google, as a result of Canadian pharmacies advertising through Google's AdWords program, plus gross revenue made by Canadian pharmacies from their sales to U.S. consumers. In fact, Google provided customer support to some of these Canadian online pharmacy advertisers to assist them in placing and optimizing their AdWords advertisements, and in improving the effectiveness of their websites. *See* Press Release, Dep't of Justice, Google Forfeits $500 Million Generated by Online Ads & Prescription Drug Sales by Canadian Online Pharmacies (Aug. 24, 2011), http://www.justice.gov/opa/pr/2011/August/11-dag-1078.html.

[246] *See* First Trademark Directive, *supra* note 163, art. 5.

[247] *See Google France*, 2010 E.C.R. I-2417, ¶ 79, Case C-278/08, BergSpechte v. Günter Guni and trekking.at, 2010 E.C.R. I-2517, ¶ 21; *see also* Case C-487/07, L'Oréal v. Honey Pot Cosmetic & Perfumery Sales, 2009 E.C.R. I-5185, ¶ 60; *Portakabin Ltd.*, 2010 E.C.R. I-0000, ¶ 29.

[248] When a third party's advertisement suggests that there is an economic link between that third party and the proprietor of the trademark, and in particular that the reseller's business is affiliated with the proprietor's distribution network or that there is a special relationship between the two undertakings. Case C-63/97, *BMW* v. *Deenik*, 1999 E.C.R. I-905, ¶¶ 51-52 (the conclusion must be that there is an adverse effect on that mark's function of indicating origin of the goods or services in question); *see also Google France*, 2010 E.C.R. I-2417, ¶¶ 83, 84; *Portakabin Ltd.*, 2010 E.C.R. I-0000, ¶ 34. In the context of keyword advertising, the advertiser cannot rely on the exhaustion rule of Article 7 of the First Trademark Directive if there are circumstances in which use of that sign by the advertiser does not enable normally informed and reasonably attentive internet users, or enables them only with difficulty, to ascertain whether the goods or services referred to by the ad originate from the proprietor of that mark or from an undertaking economically linked to it or, on the contrary, whether they originate from a third party. *See Portakabin Ltd.*, 2010 E.C.R. I-0000, ¶ 81.

[249] Although the trademark is an essential element in the system of undistorted competition that European law seeks to establish, its purpose is not, however, to protect its proprietor against practices inherent in competition, such as internet advertising. *See Interflora*, EUR-Lex CELEX LEXIS 62009CJ0323, ¶ 57; *Copad SA*, 2009 E.C.R. 2009 I-3421, ¶ 22. With respect to the advertising function of a mark, the proprietor can only act when the use of the mark as a keyword adversely affects the proprietor's use of its mark as a factor in sales promotion or as an instrument of commercial strategy. *Google France*, 2010 E.C.R. I-2417, ¶¶ 92-97). The aim of internet advertising, which relies on the use of keywords corresponding to trademarks, is merely to offer internet users alternatives to the goods or services of the proprietors of those trademarks. *Google France*, 2010 E.C.R. I-2417, ¶ 69. The fact that a competitor selects the trademark as a keyword, and thereby increases the cost-per-click for the trademark owner, is not sufficient basis in every case for concluding that the advertising function of the trademark is adversely affected. *Google France*, 2010 E.C.R. I-2417, ¶¶ 96-97).

[250] A balance must be struck between the legitimate interest of the trademark owner in being protected from resellers using his trademark for advertising in a manner that could damage the reputation of the trademark and the reseller's legitimate interest in being able to resell the goods in question by using advertising methods that are customary in his sector of trade. Case C-337/95, Parfumes Christian Dior v. Evora, 1997 E.C.R. I-6013, 1 C.M.L.R. 737, ¶ 44 (1998). When the use by a third party of a sign identical with the trademark in relation to goods or services identical with those for which the mark is registered substantially interferes with the proprietor's use of its trademark to acquire or preserve a reputation capable of attracting consumers and retaining their loyalty, the third party's use

4. Vertical Online Restraints under U.S. Competition Law (So Far, So Good)

"*First, do no harm*" (Hippocratic Oath)
Hippocrates of Cos, ancient Greek physician (*ca*. 460 BC – *ca*. 370 BC)

This section discusses the approach of U.S. antitrust law to vertical (non-price) restraints of online sales. The assessment of vertical restraints on trade is chiefly based on Section 1 of the Sherman Act.[251] In addition, certain practices concerning discrimination of prices and services vis-à-vis competing buyers are also subject to the rules of the Robinson-Patman Act,[252] which, however, policymakers are keen to repeal due to its complexity and alleged lack of coherence with other U.S. antitrust laws. Accordingly, a brief consideration of the Robinson-Patman Act is provided at the end of this section.

The promise "to abstain from doing harm," which is one of the principal precepts of medical ethics included in the Hippocratic Oath, is also a fitting description of the response of U.S. antitrust policymakers about whether existing antitrust law adequately meets the challenges of the dynamic change occurring as a result of electronic commerce. As Federal Trade Commission Chairman Pitofsky cautioned, "*abandoning antitrust principles in this growing and increasingly important sector of the economy seems like the wrong direction to go.*"[253]

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must be regarded as adversely affecting the trademark's investment function. *See Interflora*, EUR-Lex CELEX LEXIS 62009CJ0323, ¶ 62. In a situation in which the trademark already enjoys such a reputation, the investment function is adversely affected when use by a third party of a sign identical with that mark in relation to identical goods or services affects that reputation and thereby jeopardizes its maintenance. *L'Oréal SA*, 2011 E.C.R. I-0000, ¶ 83.

[251] 15 U.S.C. § 1.

[252] Section 2(a) of the Clayton Act, better known as the Robinson-Patman Act, 15 U.S.C. § 13, is the provision of the federal antitrust laws that deals with price discrimination.

[253] Robert Pitofsky, Chairman, Federal Trade Commission, Antitrust Analysis in High-Tech Industries: A 19th Century Discipline Addresses 21st Century Problems, Address before the American Bar Association Section of Antitrust Law's Antitrust Issues in High-Tech Industries Workshop (Feb. 25-26, 1999) [hereinafter Pitofsky]; *see also* David A. Balto, Assistant Director, Office of Policy and Evaluation Bureau of Competition, Federal Trade Commission, Emerging Antitrust Issues in Electronic Commerce, Address before the 1999 Antitrust Institute Distribution Practices: Antitrust Counseling in the New Millennium Program (Nov. 12, 1999) [hereinafter Balto]

Historically, the U.S. and EU have brought different perspectives to the assessment of vertical restraints under their respective antitrust laws, but their ultimate goal is the same: to promote consumer welfare and competitive market conditions.

U.S. competition law today evaluates all vertical restraints, except certain tying arrangements, under a generous rule of reason. The new economic learning integrated in the antitrust analysis suggests that vertical territorial and customer restrictions can serve clearly pro-competitive business objectives, hence the greater judicial tolerance afforded to these practices. Since its 1977 landmark ruling in *Sylvania*,[254] the U.S. Supreme Court systematically dismantled many of the *per se* rules it had created in the past fifty years. Most recently, in yet another landmark ruling, the U.S. Supreme Court held that even minimum resale price restraints ("RPM") cannot *a priori* and systematically be considered devoid of pro-competitive benefits.[255]

U.S. antitrust law can be so open-minded vis-à-vis vertical restraints, particularly territorial restraints, as opposed to the stricter EU competition law standard, because U.S. antitrust law has never been weighed down with the additional policy goal of ensuring an integrated internal market.

The adoption of the new EU competition rules on restraints of online sales highlights even further the different thinking on the two sides of the Atlantic, specifically in the area of online distribution. In contrast to the EU recent action, there is a large consensus among U.S. competition law enforcers, commentators and practitioners that U.S. antitrust doctrine provides a

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("Although the growth of [electronic commerce] this market may be unprecedented, traditional antitrust principles still apply.").

[254] Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977).

[255] Leegin Creative Leather Products v. PSKS, Inc. (Leegin), 127 S. Ct. 2705 (No. 06-480), 2007 WL 173680 (2007). Despite *Leegin*, it may be premature to abandon the distinction between price and non-price restraints and, thus, to deal with both types of restraints interchangeably. Besides the fact that, unlike non-price restraints, RPM may remain unlawful in certain states, it would also be shortsighted to claim that, because of *Leegin*, vertical non-price restraints may become even less of an issue under U.S. competition law. Arguably, non-price restraints will remain useful, at least in the short-term, while the standards applicable to RPM develop.

methodology that allows for the same principles to be equally applied to internet selling without requiring a different standard for the online context.[256]

What does that mean in practice for U.S. antitrust law?

To date, there is very little U.S. precedent concerning vertical restraints of online sales, including actions by U.S. public enforcers.[257] The history of antitrust complaints about violations of non-price restrictions, contract termination or refusal to supply, all arising from new methods of retail competition (e.g. supermarkets, shopping malls, discounts stores, or selling via phone or catalogues), actually shows that most actions are initially private lawsuits brought by dealers who are terminated or disciplined by suppliers; indeed, such complaints have generally been characterized as complaints about price.

The almost total absence of antitrust litigation in the "new" context may just be a further indication that online commerce is alive and well and that no major antitrust issues have arisen. Yet, some commentators are more pragmatic, noting that nowadays, due to a generous rule of reason, plaintiffs seldom bring cases challenging vertical restraints, particularly non-price restraints.[258] Strict pleading standards make litigation expensive and more difficult for plaintiffs

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[256] In Re/Max International, Inc. v. Realty One, Inc., 173 F.3d 995 (6th Cir. 1999), *petition for cert. filed*, 68 U.S.L.W. 3138 (Aug. 17, 1999) ("Fundamental canons of antitrust law recognize the legitimacy of permitting the natural economic forces of free enterprise to drive inefficient producers of goods and services out of the market, and replace them with efficient producers. Ordinarily, when an efficient enterprise displaces an inefficient one, we conclude that consumers' economic interests are better served, despite that the inefficient enterprise is injured or even destroyed. Conversely, when inefficiency triumphs over efficiency, consumers lose because they receive lower quality, higher-priced products and services […] Antitrust doctrine provides a methodology for courts to distinguish between instances of efficiency displacing inefficiency, which is not, per se, an economic harm and for which the law offers no redress, and inefficiency displacing efficiency, which, if achieved by the use of unfair means, the law seeks to prevent or rectify.").

[257] Namely, the Federal Trade Commission and the Antitrust Division of the Department of Justice. The treatment of vertical restraints by the two antitrust laws enforcers has evolved in concert with that of U.S. courts. Neither agency has brought many vertical restraints cases in recent years (from 1981 to 2000, they brought less than thirty cases). *See* William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377 (2003).

[258] HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE (West Hornbook Series, 4th ed. 2011) [hereinafter HOVENKAMP]. However, there is some indication that this may also be

to win. As a result, a leading commentator has even opined that, ultimately, the rule of reason is tantamount to, or operates as, *de facto* legality.[259] It goes without saying that prudent antitrust compliance should not take this statement as a foregone conclusion.[260]

Accordingly, unless a reversal or evolution in antitrust economic thinking occurs, the standard to assess restraints of online sales chiefly remains the set of established case law concerning restraints that typically occur in other forms of retail.[261]

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the case for resale price maintenance. In the three years since *Leegin* was decided, several courts have already dismissed RPM complaints for failure to properly allege a relevant market and defendant's market power. *See* PSKS, Inc. v. Leegin Creative Leather Prods., Inc., 2009 WL 938561 (E.D. Tex. 2009), *aff'd*, 615 F.3d 412 (5th Cir. 2010); Spahr v. Leegin Creative Leather Prods., Inc., 2008 WL 3914461 (E.D. Tenn. 2008). *But see* BabyAge.com v. Toys "R" Us, Inc., 558 F.Supp. 2d 575 (E.D. Pa. 2008); *see, e.g.,* Marina L. Lao, *Internet Retailing and 'Free-riding': A Post-Leegin Antitrust Analysis*, J. INTERNET LAW (forthcoming Nov. 2010); Seton Hall L. Sch. Pub. Law Research Paper No. 1740038.

[259] According to Judge Posner, "…because a Rule of Reason case is more costly to try than a per se case, fewer cases will be brought; furthermore, the probability that the plaintiff will win such a case is of course less than under a rule of *per se* illegality." *See* R. Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. CHI. L. REV. 6, 10 (1981) [hereinafter Posner, *The Next Step*]. Besides substantive issues relating to proving the anti-competitive impact of a vertical restraint, the threshold for antitrust pleading constitutes a further hurdle for plaintiffs. In Bell Atlantic v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 1966 (2007), the U.S. Supreme Court heightened the legal standards for pleading a conspiracy, requiring that a plaintiff make a statement that offers enough factual matter to suggest a right to relief. That statement must have enough "heft" to show that a pleader is entitled to relief. In practice, *Twombly* extends the reasoning of Monsanto Co. (Monsanto) v. Spray-Rile Service Corp, 465 U.S. 752, 768 (1984), and Matsushita Elec. Indus. Co. (Matsushita) v. Zenith Radio Corp., 475 U.S. 574 (1986), to an earlier stage of the litigation. Those decisions were significant in the creation of the principle, as expressed in *Matsushita*, that, "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." Under this standard, it has long been the rule that to survive a motion for summary judgment, a Section I plaintiff "must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently." But this standard generally was not applied in previous motions to dismiss, because plaintiffs had successfully argued that *Matsushita*'s reasoning had no place at the early stage of litigation before discovery and factual development had taken place. *Twombly* eliminates that argument, since the Court specifically relied on *Matsushita* at the pleading stage in requiring that, "when allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action."

[260] For instance, a federal judge in Philadelphia granted class certification to a complaint alleging that baby product retailer Babies "R" Us coerced manufacturers of high-end baby products into preventing internet dealers from discounting their products. McDonough v. Toys "R" Us Inc., No. 06-0242, 2009 WL 2055168 (E.D. Pa. July 15, 2009).

[261] The controversial nature of the law governing distribution restraints is demonstrated by abrupt policy reversals from the Department of Justice (issuing Vertical Restraint Guidelines in 1985 and then withdrawing those Guidelines in 1993) and the Supreme Court (issuing three decisions between 1963 and 1977, the first declining to set a standard governing non-price vertical restraints, the second adopting a *per se* rule, and the third discarding the *per se* rule and returning to a rule of reason). These policy shifts by the Executive and Judicial branches reflect an ongoing theoretical debate about the competitive merits of distribution restraints. *See* Warren S. Grimes, *Brand Marketing, Intra-brand Competition, and the Multibrand Retailer: The Antitrust Law of Vertical Restraints*, 64 ANTITRUST L.J. 83, 83-136 (1995-1996) [hereinafter *Antitrust Law of Vertical Restraints*].

A. *The U.S. Legal Framework to Assess Vertical Restraints: The Sherman Act*

U.S. companies are accustomed to a far less complex and rigid legal framework than the EU competition law system. In the U.S., the assessment of vertical restraints on trade is chiefly based on Section 1 of the Sherman Act, enacted in 1890, and the subsequent approach to antitrust analysis developed by the U.S. Supreme Court.[262] Even "soft legislation," like the EC Vertical Guidelines, is deemed an unnecessary "constraint" to the evolutionary nature of U.S. antitrust doctrine.[263]

Section 1 of the Sherman Act declares contracts, combinations, or conspiracies in restraint of trade to be unlawful.[264] U.S. courts have interpreted the statute more narrowly than the statutory text by determining that it only prohibits those concerted restraints that are "unreasonably restrictive" to competitive conditions.[265] A fundamental threshold inquiry in evaluating a distribution restraint is whether it is the result of an agreement or whether it is

[262] State antitrust laws closely parallel the federal laws and, in most cases, are interpreted consistently with the federal courts' interpretation of the federal laws.

[263] Robert Pitofski, former Chairman of the Federal Trade Commission, recalled the short life of vertical restraints guidelines in the U.S.: "…the Justice Department provoked strong reactions in 1985 when it issued its Vertical Restraints Guidelines, which took a very generous view of the legality of all vertical restraints. Congress and the National Association of Attorneys General denounced the Guidelines, business did not heed them, and the Justice Department rarely enforced them. Only eight years after their adoption, the Department repudiated the Guidelines when then Assistant Attorney General Anne Bingaman withdrew them in one of her first public acts after taking office." Robert Pitofski, Former Chairman, Federal Trade Commission, Vertical Restraints and Vertical Aspects of Mergers - A U.S. Perspective, Speech before the 24th Annual Conference on International Antitrust Law and Policy at the Fordham Corporate Law Institute, (Oct. 16-17, 1997) (footnotes omitted). However, in 1995, the National Association of Attorneys General adopted the revised Vertical Restraints Guidelines of the National Association of Attorneys General ("NAAG Guidelines"), which explain the general enforcement policy concerning vertical restraints of the Attorneys General. *See* National Ass'n of Attorneys General, *Vertical Restraints Guidelines*, *adopted at* Spring Meeting (Mar. 26-28, 1995). In the U.S., the Attorney General is the primary or exclusive public enforcer of state antitrust law. The Attorneys General also represent their states and consumers who live in their states in federal antitrust litigation.

[264] Section 1 of the Sherman Act states, "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1. Taken literally, the extremely broad language of the statutory test would prohibit virtually "every" contract, combination or conspiracy that restrains interstate trade or trade with foreign nations.

[265] Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 65, 31 S. Ct. 502, 55 L. Ed. 619 (1911). While § 1 could be interpreted to proscribe all contracts, *see, e.g.*, Board of Trade of Chicago v. United States, 246 U.S. 231, 138 (1918), the Court has never 'taken a literal approach to [its] language.' Texaco Inc. v. Dagher, 547 U.S. 1, 5 (2006). Rather, the Court has repeated time and again that § 1 'outlaw[s] only unreasonable restraints.' State Oil Co. v. Khan, 522 U.S. 3, 10 (1997).

merely an independent business decision.

As a matter of federal antitrust law, essentially all vertical distribution restraints are analyzed under the rule of reason.[266] The focus of U.S. antitrust law is the impact of a particular restraint on inter-brand competition, rather than its impact on intra-brand competition. Also, unlike in the EU, U.S. competition law is not concerned with other policy goals, such as the achievement of an integrated internal market.

Qualifying Vertical Agreement. Just as with horizontal agreements, illegal vertical restraints cannot be condemned without evidence of a qualifying agreement among two or more firms to impose an unreasonable restraint on competitive conditions.[267] The concept of a vertical agreement and the determination of whether it exists are probably different under U.S. and EU competition laws, respectively.

Vertical restraints are limitations *imposed* by a manufacturer on the sale of products by a dealer.[268] Under U.S. competition law, to find a conspiracy in restraint of trade, the court must find evidence of an actual meeting of minds, or "a conscious commitment to a common scheme", which "…tends to exclude the possibility of independent action by the manufacturer and

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[266] Only where judicial experience conclusively demonstrates that a certain conduct will have a "pernicious effect on competition" and "lack[s] any redeeming virtue" will U.S. courts hold the conduct *per se* illegal without examining the circumstances surrounding the conduct or its actual effect on competition. Northern Pac. Ry. Co. v. U.S., 356 U.S. 1, 5 (1958). Practices considered *per se* illegal include, for instance, horizontal agreements between actual or potential competitors to fix prices, allocate territories, customers, and discuss output as well as horizontal group boycotts by competitors with shared market power or control over a scarce resource or facility.

[267] *See, e.g.*, Monsanto Co. (Monsanto) v. Spray-Rile Service Corp., 465 U.S. 752, 768 (1984) ("A basic distinction in any distributor termination cases is the one between concerted action of the manufacturer and other distributors, which is proscribed by the Sherman Act, and independent action of the manufacturer, which is not proscribed."); United States v. Colgate & Co. (Colgate), 250 U.S. 300, 39 S. Ct. 465, 63 L. Ed. 992 (1919); Metro Ford Truck Sales, Inc. v. Ford Motor Co., 145 F.3d 320 (5th Cir. 1998), *cert. denied*, 142 L. Ed. 2d 66 (1998) ("the distinction between independent action and joint action is fundamental in antitrust jurisprudence, and a [§ 1] claim will not exist in the absence of the latter.").

[268] *See, e.g.*, Business Electronics Corp. v. Sharp Electronics Corp., 485 US 717 (1988). The term "vertical non-price restraint," as used in Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977)., and similar cases, refers to a contractual term that a dealer must accept in order to qualify for a franchise.

distributor," that is, there must be "direct or circumstantial evidence that reasonably tends to prove that manufacturer and others had a conscious commitment designed to achieve an unlawful objective."[269]

Independent Business Decision. The Supreme Court first stated the agreement requirement for vertical restraints in *United States v. Colgate & Co.*, a 1919 case in which the Court held that the pleadings were insufficient to establish a Sherman Act Section 1 "contract, combination, or conspiracy" in restraint of trade. The Court held that unilateral conduct by the manufacturer, in terminating a retailer for not adhering to resale prices (or the general circumstances under which the manufacturer will do business with the retailer), could not establish a conspiracy, because

> "*The purpose of the Sherman Act is… to preserve the right of freedom to trade. In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal; and, of course, he may announce in advance the circumstances under which he will refuse to sell. The trader or manufacturer, on the other hand, carries on an entirely private business, and can sell to whom he pleases.*"[270]

By establishing a rule of reason for all vertical restraints and inviting reconsideration of substantive standards, some commentators note that the *Sylvania* line of cases, with its *Leegin*

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[269] In *Monsanto,* sufficient evidence to support jury findings of a conspiracy was found by combining the dealer complaints with other circumstantial evidence "tending to exclude the possibility" of merely unilateral action by the defendant, where the totality of the evidence met the plaintiff's burden of proof by a preponderance of the evidence. 465 U.S. 752. *Monsanto* further requires proof of communicated acquiescence or agreement by the party whose agreement or acquiescence agreement or acquiescence is sought. Parkaway Gallery Furniture Inc. v. Kittinger/Pennsylvania, 878 F.2d 80 I, 806 n.4 (4th Cir. 1989) ("to prevail on an unwilling co-conspirator" theory, plaintiff must show "acquiescence in [a firmly enforced restraint… induced by the communicated danger of termination"); Spectators' Communication Network v. Colonial Country Club, 23 F.3d 1005 (5th Cir. 2000) (holding a conspiracy can be shown where actors lack a common interest but a party has been enticed or coerced into anti-competitive behavior).

[270] *Colgate*, 250 U.S. 300 ('The trader or manufacturer, on the other hand, carries on an entirely private business, and can sell to whom he pleases.'); United States v. Trans-Missouri Freight Ass'n, 166 U. S. 290, 320, 17 S. Ct. 540, 551, 41 L. Ed. 1007 ('A retail dealer has the unquestioned right to stop dealing with a wholesaler for reasons sufficient to himself, and may do so because he thinks such dealer is acting unfairly in trying to undermine his trade.') (citation omitted).

capstone, may eliminate the need for a supplier to invoke "unilateral conduct"[271] to defend vertical restraints that are reasonable and pose no significant competitive risk (at least in those States where RPM is not still per se illegal).[272]

Dealers' Complaints and "Disciplined" Dealers. Subsequent decisions have more or less shown tolerance for conduct that involves supplier interactions with rival dealers when, for instance, a dealer unwillingly complies with a unilateral policy simply to avoid termination[273] or when a supplier reacts to complaints by other dealers. *Monsanto* confirms that: i) a distributor receiving a *Colgate* policy statement is free to acquiesce to the manufacturer's demand in order to avoid termination; ii) such acquiescence does not exclude the possibility of independent action (and is in fact a form of independent action); iii) constant communication does not show that distributors are not exercising pricing independence; and iv) complaints from dealers about other dealers are natural and unavoidable reactions, which, if treated as the basis for conspiracy, would

[271] Compliance with the unilateral conduct defense may entail high administrative costs for the manufacturer and does not necessarily prevent a court from establishing a Sherman Act Section 1 "contract, combination, or conspiracy." *See, e.g.*, United States v. Parke, Davis & Co., 362 U.S. 29, 45 (1960) (finding that acquiescence was not voluntary because of Parke Davis' affirmative action to achieve compliance, such as discussions with key accounts, followed by announcements that such accounts were "on board"). Hovenkamp notes that in order to claim the exception under *Colgate*, the manufacturer can do no more than announce its intent not deal with price cutters and refuse to deal with violators later on. HOVENKAMP, *supra* note 258. Other commentators point out that the *Colgate* defense requires "legal gymnastics" that is costly, disruptive to dealer-manufacturer relations, and has no relevance to the pro-competitive or anti-competitive effects of the underlying practice. *See Antitrust Law of Vertical Restraints*, *supra* note 261; *see also* Brief for Ping, Inc., as Amici Curiae Supporting Petitioner, Leegin Creative Leather Products v. PSKS, Inc., 127 S. Ct. 2705 (No. 06-480), 2007 WL 173680 (2007).

[272] Under *Leegin*, the distinction between unilateral policies and agreements is arguably of less importance, at least under the Sherman Act. Where vertical price restraints are judged under the rule of reason, firms can enter into RPM or minimum advertised price ("MAP") agreements and benefit from the greater flexibility to negotiate and enforce their terms. Instead of having to choose between terminating a dealer upon its first violation or entering discussions that risk a finding of a "coerced" agreement, a manufacturer can communicate its desires, answer questions, and negotiate disagreements, all of which lead to better communication and greater efficiency. It also gains the certainty of contract law to enforce the agreement's terms and, assuming proper drafting, retains the option to terminate if necessary.

[273] *See* Isaken v. Vermont Castings Inc., 825 F.2d 11 58 (7th Cir 1987) (reasoning that, "… a plaintiff who is all involuntary participant must prove that the defendant induced his participation by conduct that went beyond merely announcing a policy of terminating dealers who sell below suggested retail prices … If (but only if) he agrees to adhere (having been asked to), there is an agreement, no matter how unwilling he is; but it does not follow that his agreement to adhere can never be implicit, or signified by conduct in lieu of promissory language.").

create an irrational dislocation in the market.[274]

Disguised Horizontal Agreement? On the other hand, plaintiffs have often tried to bypass *Sylvania*'s liability defeating rule of reason and/or the *Colgate* defense by characterizing the supplier's refusal to deal or dealer termination as a boycott or concerted refusal to deal, which, as horizontal agreements, can be illegal *per se*.[275] For instance, the court in *Ryko* recalled that, "[W]hen competing distributors conspire with their supplier to impose restrictions that redound primarily to the benefit of the distributors, the agreement should be considered horizontal although it is vertical in the form."[276] Absent such an attempt to disguise a conspiracy for the benefit of competitors, "[i]f the evidence is consistent with the hypothesis that the firm at

[274] *Monsanto,* 465 U.S. 752. The Supreme Court held that permitting an agreement to be inferred merely from the existence of complaints, or even from the fact that termination came about "in response to" complaints, could deter or penalize perfectly legitimate conduct. As *Monsanto* points out, complaints about price-cutters "are natural—and from the manufacturer's perspective, unavoidable—reactions by distributors to the activities of their rivals." Such complaints, particularly where the manufacturer has imposed a costly set of non-price restrictions, "arise in the normal course of business and do not indicate illegal concerted action … [T]o bar a manufacturer from acting solely because the information upon which it acts originated as a price complaint would create an irrational dislocation in the market" 465 U.S. at 764 n.8; Computer Place, Inc. v. Hewlett-Packard Co., 607 F.Supp. 822 (1984), 1984-2 Trade Cases ¶ 66,254; Worldhomecenter.com, Inc. v. KWC America, Inc., No. 10 Civ. 7781 (S.D.N.Y. Sept. 15, 2011) (the mere observation that the [internet advertising price policy] IAP is mutually beneficial to KWC and its non-Internet distributors is not an adequate factual allegation of agreement or conspiracy. Nor does plaintiff allege additional facts from which an agreement could be inferred.). *But see* Worldhomecenter.com, Inc. v. Thermasol, Ltd., No. 05 Civ. 3298, at 7 (E.D.N.Y. July 10, 2006) (finding that complaint adequately alleged agreement between manufacturer and distributors to fix price where "[t]he allegation is that [the manufacturer's] actions were not independent, and that independent actions of this ilk would be anomalous in the absence of some agreement between [the manufacturer] and its traditional distributors."); *see also* Worldhomecenter.com, Inc. v. L.D. Kichler Co., No. 05 Civ. 3297 (DRH), 2007 WL 963206 (E.D.N.Y. Mar. 28, 2007).

[275] Group boycotts cover a range of joint conduct by firms intended to exclude competitors from a market. Whether a boycott is illegal *per se* or is tested under the rule of reason depends on the nature of the joint activity. The distinguishing feature of a boycott condemned as *per se* unlawful is generally the participation of two or more competitors, and its exclusionary objective, aimed at injuring or disadvantaging a rival. *See, e.g.,* Toys' "R" Us, Inc. v. FTC, 221 F.3d 928, 936-37 (7th Cir. 2000) (toy retailer organized boycott of discounting competitors by major suppliers); *see ABA Section of Antitrust Law*, *in* ANTITRUST HANDBOOK FOR FRANCHISE AND DISTRIBUTION PRACTITIONERS 12 (2008) [hereinafter ANTITRUST HANDBOOK]; *cf.* Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 296-97 (1985) (to establish a *per se* violation, antitrust plaintiff must make "threshold showing" that members of an alleged group boycott "possess market power or exclusive access to an element essential to effective competitive.").

[276] Ryko Manufacturing v. Eden Services, 823 F.2d 1215 (8th Cir. 1987); *see also* United States v. Sealy, Inc., 388 U.S. 350, 353-54, 87 S. Ct. 1847, 1850-51, 18 L. Ed. 2d 1238 (1967); Cernuto, Inc. v. United Cabinet Corp., 595 F.2d 164, 168 (CA3 1979). For a wider discussion on related issues, see Herbert J. Hovenkamp, *Vertical Restraints, Dealers with Power*, *and Antitrust Policy* (U Iowa Legal Studies Research Paper No. 10-37, Sept. 24, 2010) [hereinafter Hovenkamp, *Vertical Restraints, Dealers with Power, and Antitrust Policy*].

the top of the vertical chain designed the restrictions for its own purposes, an inference of [horizontal] conspiracy is inappropriate."

However, in *Toledo Mack*, the Third Circuit condemned a horizontal agreement between Mack Truck dealers to limit price competition and to collectively induce their manufacturer/supplier to impose resale price maintenance on a price cutting dealer;[277] interestingly, the court found that the *per se* rule applied to the horizontal portion of the conspiracy, but the rule of reason applied to the vertical portion.[278] According to the court, "… The rule of reason analysis applies even when, as in this case, the plaintiff alleges that the purpose of the vertical agreement between a manufacturer and its dealers is to support illegal horizontal agreements between multiple dealers."

The Rule of Reason. U.S. competition law adopts a simpler and less rigid system to assess vertical antitrust issues. The system is chiefly based on the rule of reason principle, which applies to all vertical distribution restraints. Under U.S. competition law, there are no "hardcore" restraints or "safe harbors," like in the EU. Similarly, there are no vertical restraints guidelines, and, more importantly, the rule of reason applies equally to offline and online distribution channels. Furthermore, U.S. competition law has no equivalent to the EU distinction between exclusive and selective distribution for the purpose of applying the rule of reason.

Simply stated, under the rule of reason, "the fact finder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition."[279] The test that has evolved is not so much a set standard

[277] Toledo Mack Sales & Service, Inc. v. Mack Trucks, Inc., 530 F.3d 204 (3d Cir. 2008).
[278] Though unsuccessful, the *Colgate* defense that there was no agreement was raised in a rule of reason challenge to RPM.
[279] Continental T.V., Inc. v. GTE Sylvania Inc. (Sylvania), 433 U.S. 36, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977). According to Judge Posner, the authoritative statement of the rule of reason remains that of Justice Brandeis in

of behavior as it is a general inquiry into whether, "under all the circumstances," a vertical restraint results in anti-competitive effects in a properly defined relevant market, and any proven pro-competitive benefits do not outweigh the harm. In essence, a rule of reason analysis may be summarized along the following steps:[280]

- First, the plaintiff must show that an actual agreement or conspiracy exists, as opposed to unilateral action by the defendant that happens to have a competitive impact further down the distribution chain.
- Second, the plaintiff must generally establish the product and geographic parameters of the relevant market allegedly affected by the defendant's conduct, and he must also establish that the defendant has a significant influence over price and competition (i.e., significant market power) within that market (but a full-blown market analysis may be avoided if anti-competitive effects may be shown by direct evidence of actual detrimental effects).
- Third, the plaintiff must show that the challenged restraint significantly and adversely

Chicago Board of Trade v. United States, 246 U.S. 231 (1918), who stated that, "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences." 246 U.S. at 231.

[280] *See* ANTITRUST HANDBOOK, *supra* note 275. The Supreme Court made it clear that the rule of reason permits a truncated review when, for example, the practice at issue is plainly anti-competitive and does not appear to have any "countervailing competitive virtue." Cases adopting this approach simplify the market analysis required for the plaintiff to establish a prima facie case under the rule of reason if the defendant's conduct is shown to be of a type that, while not per se illegal, appears so likely to have anti-competitive effects (higher prices or reduced output or service quality) that it becomes unnecessary to go through a full-blown analysis of market definition and market power before shifting the burden onto the defendant to come forward with a plausible, pro-competitive justification for its behavior. In the words of the Supreme Court, "depending upon the concerted action in question, the Rule of Reason may not require a detailed market analysis; it 'can sometimes be applied in the twinkling of an eye.'" *See* National Collegiate Athletic Ass'n v. Board of Regents of University of Oklahoma, 468 U.S. 85, 104 S. Ct. 2948, 82 L. Ed. 2d 70, 18 Ed. L. Rep. 50, 1984-2 Trade Cas. (CCH) ¶ 66139 (1984); F.T.C. v. Indiana Federation of Dentists, 476 U.S. 447, 459, 106 S. Ct. 2009, 90 L. Ed. 2d 445, 1986-1 Trade Cas. (CCH) ¶ 67117 (1986).

affects or threatens competition within the market.

- Fourth, the anti-competitive effects of the restraint must be balanced against applicable pro-competitive justifications—such as enhanced dealer attention to product promotion or customer service—to determine whether the restriction is, on balance, competitively unreasonable within the overall (i.e., inter-brand) market and whether any pro-competitive benefits could have been reasonably achieved through less anti-competitive means.

No safe-harbor or black-list. After *Sylvania*, U.S. antitrust doctrine started to recognize the potential pro-competitive benefits of vertical restraints;[281] however, over the years some language in *Sylvania* has been interpreted as raising a virtual presumption that non-price vertical restraints are pro-competitive.[282] In actuality, a careful reading of *Sylvania* shows that the

[281] The Supreme Court recognized in *Sylvania* that restricted distribution practices may enhance inter-brand competition "by allowing the manufacturer to achieve certain efficiencies in the distribution of his products." Specifically, the Court noted at least three ways that vertical restraints may enhance inter-brand competition: first, new manufacturers and manufacturers entering new markets can use the restrictions to induce retailers to invest in capital and labor to the extent required to distribute products unknown to the customer; second, manufacturers can use the restrictions to induce retailers to engage in promotional activities or provide service and repair facilities; and third, manufacturers can use the restrictions to ensure product quality and safety. The Court also explicitly recognized the free-rider problems. Moreover, and perhaps of greater importance, the Court expressly rejected the contention that the antitrust laws protect the "freedom of traders" or some sociopolitical variant.

[282] In *Sylvania*, the Court held that vertical restrictions: first, "promote inter-brand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products;" second, inter-brand competition is the "primary concern of antitrust law"; and third, inter-brand competition provides a "significant check on the exploitation of intra-brand market power because of the ability of consumers to substitute a different brand of the same product." 433 U.S. at 54. Judge Richard Posner has described the rule of reason as "in practice … no more than a euphemism for non-liability." *See* Richard A. Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision*, 45 U. CHI. L. REV. 1, 14 (1977). According to W. Grimes, the Court's assertion in *Sylvania* that, "inter-brand competition provides 'a significant check on the exploitation of intra-brand market power' fails to recognize that the brand promotion associated with vertical restraints tends to increase brand differentiation and that increased brand differentiation means lower demand elasticity, and hence greater market power." In short, the more effective a vertical restraint is in differentiating a brand, the greater the reduction in inter-brand competition, such that, when brands are highly differentiated, intra-brand competition provides a natural market response. *See Antitrust Law of Vertical Restraints, supra* note 261, at 83-136; Sandura Co. v. F.T.C., 339 F.2d 847, 857 (6th Cir.1964) (reasoning that, "significant product differentiation increases somewhat the importance of intra-brand competition between distributors and increases correspondingly the required justification for abolishing it"); *see also* Generac Corp. v. Caterpillar Inc., 172 F.3d 971 (1999); AMERICAN BAR ASS'N, *Vertical Restrictions Limiting Intrabrand Competition*, *in* VOL. 2 OF MONOGRAPH, SECTION OF ANTITRUST LAW 64-65 (ABA, Section of Antitrust Law, 1977) ("The greater the product differentiation, the lesser the degree to which

Supreme Court was clear that, in certain circumstances, vertical non-price[283] restraints limit intra-brand competition without producing any countervailing benefit to inter-brand competition and may, as a result, violate Section 1 under the rule of reason.[284] In particular, courts applying the rule of reason to vertical restraints would likely take into account the following facts and circumstances: (i) the market power of the manufacturer imposing the restraints, (ii) whether the restraint has been imposed at the request of a dominant retailer or in the context of some concerted horizontal dealers activity, and (iii) the number of manufacturers imposing similar restraints.[285]

Under U.S. competition law there is no "safe harbor," like under EU competition law,[286] but a fundamental threshold inquiry in rule of reason analyses is whether evidence exists that the defendant possesses market power.[287] Plaintiffs have little chance to prevail absent evidence of

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inter-brand competition will be effective.").

[283] With regard to price restraints, in *Leegin* the Supreme Court identified four circumstances where the use of RPM might be anti-competitive: (1) when used by a manufacturer cartel to identify members that are cheating on a price-fixing agreement; (2) when used to organize a retailer cartel by coercing manufacturers to eliminate price cutting; (3) when used by a dominant retailer to protect it from retailers with "better distribution systems and lower cost structures," thereby forestalling innovation in distribution; and (4) when used by a manufacturer with market power to give retailers an incentive not to sell the products of smaller rivals or new entrants. *Leegin*, 127 S. Ct. 2705.

[284] *See* A. Douglas Melamed, Principal Deputy Assistant Attorney General, Antitrust Division, U.S. Dep't of Justice, Exclusionary Vertical Agreement, Address before The American Bar Association Antitrust Section (Apr. 2, 1998).

[285] *See, e.g.*, Hovenkamp, *Vertical Restraints, Dealers with Power, and Antitrust Policy, supra* note 276; Robert L. Steiner, *How Manufacturers Deal with the Price-Cutting Retailer: When Are Vertical Restraints Efficient?*, 65 ANTITRUST L.J. 407 (1996-1997) [hereinafter Steiner].

[286] Admittedly, though, the generosity of the rule of reason makes safe harbors less of a need, in contrast to EU competition law. The NAAG Guidelines reject the idea of having "arbitrary cutoff points which can be said to assure that a restraint will or will not definitely be challenged." The NAAG Guidelines reject such safe harbors, treating concentration, coverage and entry barriers as only three of a number of factors to be considered under the rule of reason; others include: (1) whether the product involved is fungible or highly differentiated, (2) whether dealerships have multiple exclusive dealerships, (3) whether dealers were involved in imposition of the restraint, (4) whether the supplier requires dealers to perform additional services, (5) whether the restraint has a lengthy contractual term, (6) whether the restraint is airtight and inflexible, (7) whether the restraint increases or decreases scale economies, (8) whether there are or have been patterns of consciously parallel or tacitly collusive behavior, (9) whether the restraint has had an effect on output, (10) whether the restraint is impervious to market forces, and (11) whether the number of price/quality options for consumers are increased (pro-competitive) or decreased (anti-competitive) by imposition of the restraint.

[287] Market power is generally defined as the power to control prices or reduce output in a relevant market. Valley Liquors v. Renfield Imps., 678 F.2d 742, 745 (7th Cir. 1982) ("A firm that has no market power is unlikely to adopt policies that disserve its consumers; it cannot afford to.... Even if there is some possibility that the distribution

defendants' market power.[288]

Similarly, there are no vertical "hard core" restraints under U.S. competition law, but anti-competitive effects may be shown by direct evidence of actual detrimental effects, such as reduced output or supra-competitive prices, under a "truncated" rule of reason inquiry.[289]

Price vs. non-price restraints. Complaints about violations of non-price restrictions have often been verbalized as complaints about price, that is, they complain about the phenomenon that appears to cause their injury: the price cutting, rather than the violation of a non-price restraint. The Supreme Court eventually recognized this issue in *Business Electronics*, noting that virtually all dealer complaints will be couched in terms of price cutting, even vertical restraints that do not result in dealer termination, such as the initial grant of an exclusive territory

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practices of a powerless firm will have a substantial anti-competitive effect, it is too small a possibility to warrant trundling out the great machinery of antitrust enforcement.") The Supreme Court specifically admonishes that, "it is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive." Bell Atlantic Corp. v. Twombly, 127 U.S. 1955, 1966-67 (2007); *see also* Muenster Butane, Inc. v. The Stewart Company, 651 F.2d 292, 1981-2 Trade Cases 64, 163 (reasoning that, "A requirement that plaintiff prove market power in this case would have saved the litigants and the courts much expense."); Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 464, 481, 112 S. Ct. 2072, 119 L. Ed. 2d 265, 1992-1 Trade Cas. (CCH) ¶ 69839 (1992). *But cf*. Jacobs v. Tempur-pedic Int'l, Inc., 2010 WL 4880864 (11th Cir. 2010) (Ryskamp, J., dissenting) (Justice Ryskamp avers that, "[t]he majority goes too far in its application of Twombly and essentially requires Jacobs to prove his case in his complaint." Specifically, he faults the majority for demanding "empirical evidence" at this stage of the litigation. Without access to discovery, he continues, Jacobs should not be expected to be able to provide detailed factual allegations relating to cross-elasticity and price sensitivity. Twombly itself, he notes, stated that "a complaint … does not need detailed factual allegations.").

[288] A leading commentator on vertical restraints has suggested that proof of the antitrust defendant's "substantial" market power should be a preliminary hurdle in all restricted distribution cases; he states that, "(I)f a firm lacks market power, it cannot affect the price of its product," and thus any vertical restraint could not be anti-competitive at the inter-brand level. Posner, *The Next Step*, *supra* note 259, at 16; *see also* A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d 1396, ¶ 29 (7th Cir.1989) ("Cases frequently say that as a matter of law single firm shares of 30% or less cannot establish market power"); Graphic Products Distributors v. Itek Corp., 717 F.2d 1560, 1570-71 (11th Cir. 1983) (70% market share and product differentiation demonstrated substantial market power); Moecker v. Honeywell Int'l, 144 F. Supp. 2d 1291, 1305-07 (M.D. Fla. 2001) (where manufacturer had 92% of van conversion seat belt market in 1993 and 70% in 2000, it was jury question whether it had market power and, if so, whether intra-brand competition would provide source of consumer welfare); PepsiCo v. Coca-Cola Co., 315 F.3d 101, 109 (2d Cir. 2002) (inter-brand competition strong despite syrup supplier's 65% share of product market).

[289] National Collegiate Athletic Ass'n v. Board of Regents of Univ. of Oklahoma, 468 U.S. 85, 109 n. 39, 104 S. Ct. 2948, 82 L. Ed. 2d 70, 18 Ed. L. Rep. 50, 1984-2 Trade Cas. (CCH) ¶ 66139 (1984) ("depending upon the concerted action in question, the Rule of Reason may not require a detailed market analysis; it 'can sometimes be applied in the twinkling of an eye.'") (internal citation omitted).

or the requirement that certain services be provided.[290]

After *Leegin*, such a distinction is less relevant, since all vertical restraints are assessed with the rule of reason under U.S. Federal antitrust law. That said, it is also true that RPM may remain unlawful in certain states due to state-specific statutes that ban RPM or due to the possibility that at least some state courts may refuse to follow *Leegin* in construing a state's general antitrust law.[291] Besides, in the past, a recurring issue in evaluating the "reasonableness" of a vertical restraint was whether the least restrictive limitation had been imposed on distributors' activity necessary to achieve the firm's inter-brand goals. It is now settled that this is just one element, if considered at all, in the evaluation of reasonableness.[292]

B. *No Special Treatment for Online Sales*

In 1999, when online commerce was in its infancy, the first views about how to assess

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[290] Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 108 S. Ct. 1515 (1988) ("Accordingly, a manufacturer that agrees to give one dealer an exclusive territory and terminates another dealer pursuant to that agreement, or even a manufacturer that agrees with one dealer to terminate another for failure to provide contractually obligated services, exposes itself to the highly plausible claim that its real motivation was to terminate a price cutter."). The Court noted that in such instances, "Manufacturers would be likely to forgo legitimate and competitively useful conduct rather than risk treble damages and perhaps even criminal penalties." *Id*. at 727-28. To avoid such an aberrant consequence, the Court thus required that there be a rather specific agreement between the supplier and the complaining dealer(s) about the price that the "undisciplined" dealer must charge.

[291] *See, e.g*., California v. Bioelements, Inc., No. 10011659 (Cal. Super. Ct. Riverside Cty. Jan. 11, 2011) (Bioelements Consent Decree); *see also* New York v. Herman Miller Inc., No. 08 CV-02977 (S.D.N.Y. Mar. 25, 2008) (Stipulated Final Judgment and Consent Decree), *available at* http://www.oag.state.ny.us/bureaus/antitrust/pdfs/Signed_FJ.pdf; People v. Tempur-Pedic Int'l, Inc., No. 400837/10 (N.Y. Sup. Ct. Jan. 14, 2011) (The NY Attorney General attempted to prosecute per se treatment of RPM by alleging violation of state, rather than federal, law (Section 369(a) of NY Business Code)).

[292] *See, e.g*., Am. Motor Inns v. Holiday Inns, 521 F.2d 1230, 1249 (3d Cir. 1975) ("the test is not whether the defendant employed the least restrictive alternative," but whether the restriction is reasonably necessary to protect the defendant); *Graphic Prods. Distribs.*, 717 F.2d at 1577, n.31 ("supplier not obligated to select least restrictive alternative, but failure to show that restraints were reasonably necessary to achieve a legitimate purpose supported finding of unreasonableness"). As to the availability of less restrictive alternatives in analyzing vertical non-price restraints under the rule of reason, see generally AREEDA & HOVENKAMP, *supra* note 68, ¶ 1602. On the other hand, it is worth recalling that under EU competition law the "indispensability" of a certain vertical restraint is a relevant factor embedded in Article 101(3) TFEU. *See, e.g*., Vertical Guidelines, *supra* note 32, ¶ 109 ("…the negative effects on competition may differ between the various vertical restraints, which plays a role when indispensability is discussed under Article 101(3)"); *id.* ¶ 125 ("In the application of the indispensability test contained in Article 101(3), the Commission will in particular examine whether individual restrictions make it possible to perform the production, purchase and/or (re)sale of the contract products more efficiently than would have been the case in the absence of the restriction concerned").

vertical restraints in the electronic commerce context was that antitrust analysis could use principles of general applicability in the context of a particular market environment.[293] Put simply, though e-commerce was recognized as a new force that presented numerous differences to traditional commercial transactions, it was not the first change in distribution and retail markets to have widespread competitive effects that could not be analyzed under the lense of traditional antitrust principles.

Today, there is still a general consensus among enforcers and practitioners that U.S. antitrust doctrine is sufficiently flexible, and sufficiently informed by economic theory, to cope effectively with the distinctive-seeming antitrust problems that the new economy presents.[294] As held by the U.S. Supreme Court, antitrust doctrine "evolv[es] with new circumstances and new wisdom."[295]

However, such common wisdom is not shared by everybody. Recently, some commentators have criticized the U.S. Supreme Court for ignoring the effects that the *Leegin*

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[293] *See* Pitofsky, *supra* note 253; Balto, *supra* note 253.

[294] RICHARD A. POSNER, ANTITRUST LAW 256 (2d ed.). In 2007, the conclusions of the Antitrust Modernization Commission generally confirmed this position. The Antitrust Modernization Commission, tasked to examine whether the need existed to modernize the antitrust laws and to identify and study related issues, submitted its Report and Recommendations to Congress and the President on Apr. 2, 2007. ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS (Apr. 2, 2007) [hereinafter ANTITRUST MODERNIZATION COMMISSION, REPORT], http://govinfo.library.unt.edu/amc/report_recommendation/toc.htm ("…The evolution of antitrust law—both through case law and agency guidelines—has shown that new or improved economic learning can be incorporated into antitrust analysis as appropriate. Allowing the ongoing incorporation of economic learning into antitrust case law and agency guidelines is preferable to attempts at legislative change to specify different antitrust analyses for industries characterized by innovation, intellectual property, and technological change. Industries that fall into those categories will keep changing over time; attempts to define them would likely be difficult and impermanent at best. Furthermore, economic learning continues to evolve, and antitrust law needs to be able to incorporate this new learning as appropriate."); *see* ANTITRUST HANDBOOK, *supra* note 275 ("Restrictions on Internet sales by franchisees or resellers are increasingly commonplace. In some jurisdictions, statutory prohibitions preclude the use of the Internet by franchisors … Generally speaking, the antitrust laws apply to e-commerce restraints to the same extent as to restraints affecting bricks-and-mortar businesses") (citation omitted); *see also* Section of Antitrust Law & Section of International Law, *Joint Comments of the ABA Section of Antitrust Law and Section of International Law on the Proposal of the European Commission for a Revised Block Exemption Regulation and Guidelines on Supply and Distribution Agreements*, American Bar Association, 9 (Sept. 2009), *available at* http://ec.europa.eu/competition/consultations/2009_vertical_agreements/americanbarassociation_en.pdf.

[295] *Business Electronics Corp.*, 485 U.S. 717.

ruling will have on e-commerce specifically.[296] In this landmark judgment, the U.S. Supreme Court reversed the 96-year-old *Dr. Miles*'s doctrine, that vertical price restraints were illegal *per se* under Section 1 of the Sherman Act, and replaced the older doctrine with the rule of reason.

Clearly, the key point is not so much that *Leegin* overruled *Dr. Miles* and replaced the *per se* approach on RPM, because such a shift is probably preferable; rather, the U.S. Supreme Court has arguably missed a good opportunity to replace the *per se* approach with a modern rule of reason that takes the specific dynamics of online commerce into account.[297] While the majority opinion ignored this factor altogether, the dissenting opinion only made a cursory reference to e-commerce:

> "*No one claims that the American economy has changed in ways that might support the majority. Concentration in retailing has increased … That change, other things being equal, may enable (and motivate) more retailers, accounting for a greater percentage of total retail sales volume, to seek resale price maintenance, thereby making it more difficult for price-cutting competitors (<u>perhaps internet retailers</u>) to obtain market share.*" (Emphasis added)

[296] *See, e.g.*, Erich M. Fabricius, *The Death of Discount Online Retailing? Resale Price Maintenance after Leegin v. PSKS*, 9 N.C. J. LAW & TECH. 1 (Fall 2007); Daniel B. Nixa, *Note: Internet Retailers and Intertype Competition: How the Supreme Court's Incomplete Analysis in Leegin v. PSKS Leaves Lower Courts Improperly Equipped to Consider Modern Resale Price Maintenance Agreements Winter*, 11 VAND. J. ENT. & TECH. L. 461 (2009) [hereinafter Nixa]; *Leegin's Unexplored "Change in Circumstance": The Internet and Resale Price Maintenance*, 121 HARV. L. REV. 1600 (2008); Grimes, *supra* note 29; Press Release, American Antitrust Institute Already Struggling Consumers Hit Hard This Holiday Season by Lack of Discounts on Price-fixed Gifts and Other Products, (December 4, 2008), *available at* http://www.google.com/url?sa=t&source=web&cd=1&sqi=2&ved=0CBkQFjAA&url=http%3A%2F%2Fwww.antitrustinstitute.org%2Ffiles%2FAAI%2520RPM%2520Press%2520Release.12.4.08_120420081708.pdf&rct=j&q=FOR%20IMMEDIATE%20RELEASE%20CONTACT%3A%20Sarah%20Frey%20December%204%2C%202008&ei=x-XQTcb2IcjoOamUqPcM&usg=AFQjCNF4_ts07s-RcQk-pULteCuX-rdutw&cad=rja; *see also* Christine A. Varney, Assistant Attorney General, Antitrust Division, U.S. Dep't of Justice, Antitrust Federalism: Enhancing Federal/State Cooperation, Remarks Prepared for the National Ass'n of Attorneys General Columbia Law School State Attorneys General Program (Oct. 7, 2009), http://www.usdoj.gov/atr/public/speeches/250635.pdf. Besides, there are congressional proposals to reverse *Leegin*. One of these is the Johnson-Conyers Bill, H.R. 3190, 111th Cong. (2009). On July 30, 2009, the House Judiciary Committee's Courts and Competition Policy Subcommittee approved H.R. 3190. Senator Herb Kohl (D-Wis.), just months after *Leegin* was decided, introduced a bill to restore the *per se* rule of illegality for RPM. S. 2261, 110th Cong. (2007). He introduced a subsequent bill to preserve the initiative. S. 148, 111th Cong. (2009). The House and Senate have held subcommittee hearings on these initiatives, but it is not yet known whether or when this legislation will move forward.

[297] After *Sylvania* overturned the *per se* rule for all non-price vertical restraints, the *per se* illegality of price restraints was in fact the last fundamental issue on vertical restraints that would have offered such a unique opportunity.

In this passage of his dissenting opinion, Justice Breyer (with whom Justice Stevens, Justice Souter, and Justice Ginsburg joined), like the majority, essentially recognized that RPM can potentially provide benefits as well as potentially anti-competitive effects. As the parenthetical reference to internet retailers shows, the dissenting opinion appears to have solely focused on how often those harms or benefits are likely to occur, and, surprisingly, failed to emphasize the importance of weighing the impact of vertical restraints specifically on internet retailers, which was certainly the only significant "new circumstance" in the counterfactual to weigh in.[298]

Manufacturers' desire to control prices in order to protect brand image and to shield retailers from internet competition makes RPM a more valuable tool for manufacturers than it was in the past; interestingly, this fact was apparently deemed irrelevant by the Supreme Court, which did not even explain why RPM does not make it more difficult for "price-cutting" competitors –particularly internet retailers- to obtain market share.[299]

After all, in overruling *Dr. Miles*, the Supreme Court rationalized its failure to follow precedent by explaining that, "…the Sherman Act [is] a common-law statute" that must adapt to

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[298] Balto, *supra* note 253 ("The Internet poses different economic issues than traditional retailing, and thus more careful evaluation of resale price maintenance is appropriate").

[299] According to Warren S. Grimes, intra-brand competition is important, since it would preserve entry opportunities for new retailers and new retailing approaches by preserving one of the new entrant's most potent competitive tools: the ability to discount popular branded items that draw customers. *See Antitrust Law of Vertical Restraints, supra* note 261, at 83-136. Other commentators note that the terms "inter-brand" and "intra-brand" competition do not properly describe the features of the modern marketplace brought about by the internet distribution channel. "By focusing on RPM agreements solely through the lens of intra-brand and inter-brand competition, courts may not adequately consider the changes resulting from the development and growth of online retailing. Inter-brand competition— the competition between firms selling different brands but similar products—does not adequately describe firms who are selling the same brand in different distribution channels, such as the Internet. Intra-brand competition—generally describes vertical competition between firms in the same distribution channel selling the same brand—comes closer, but fails to encompass the extent to which different demand curves may accompany the same physical products in different distribution channels. The term 'intertype competition' better defines the competition between different types of firms as well as firms selling the same brand in different channels. With internet retailers, this difference is the result of selling products online, which represents a substantially different means of selling products than traditional brick-and-mortar firms." *See* Nixa, *supra* note 296.

"the dynamics of present economic conditions."[300] But the lack of consideration for such an issue may simply be a matter of time, as Judge Posner once noted: "Antitrust litigation moves very slowly relative to the new economy. Law time is not real time."[301]

C. *Limiting Online Sales under U.S. Competition Law*

The foregoing discussion helps one understand, in general terms, the differences between U.S. and EU competition laws with regard to their respective approaches to vertical restraints of online sales.

From a policy perspective, in Europe, competition policy goals (promoting consumer welfare and competitive market conditions) are entangled with the other fundamental policy aim of achieving the single internal market. As a result, intra-brand competition and state boundaries still play a relevant role under EU competition law. Conversely, such factors have little or no

[300] Observing that the "economics literature is replete with pro-competitive justifications for a manufacturer's use of resale price maintenance," and "even those more skeptical of resale price maintenance acknowledge it can have pro-competitive effects," the Majority found that, "notwithstanding the risks of unlawful conduct, it cannot be stated with any degree of confidence that resale price maintenance 'always or almost always tend[s] to restrict competition and decrease output." *Leegin*, 2007 WL 173680, at *9. Finding that, "vertical agreements establishing minimum resale prices can have either pro-competitive or anti-competitive effects, depending upon the circumstances in which they are formed," and considering other reasons, the Court ruled that, "vertical price restraints are to be judged according to the rule of reason." *Id*. Therefore, the Majority reasoned that the justifications for vertical price restraints are similar to those for other vertical restraints, chiefly promoting inter-brand competition, even if that entails the reduction of intra-brand competition, because "the primary purpose of the antitrust laws is to protect [this type of] competition." *Id*. The Majority opinion emphasized the distribution efficiencies of RPM, like the potential to give consumers more options such that they can choose among low-price, low-service brands; high-price, high-service brands; and brands that fall in between. In fact, absent vertical price restraints, the retail services that enhance inter-brand competition might be underprovided as a result of free-riding by discount retailers. Minimum resale price maintenance alleviates the problem, because it prevents the discounter from undercutting the service provider. With price competition decreased, the manufacturer's retailers compete among themselves over services. Justice Kennedy adhered to the view that lower prices would result from the protection of inter-brand competition by the antitrust laws and from the fact that the interests of manufacturers and consumers were aligned with respect to retailer profit margins. "As a general matter, therefore, a single manufacturer will desire to set minimum resale prices only if the 'increase in demand resulting from enhance[d] service . . . will more than offset a negative impact on demand of a higher retail price'." *Id*.

[301] *See* Richard A. Posner, *Antitrust in the New Economy* (U. Chi. L. & Econ., Olin Working Paper No. 106, Nov. 2000) ("The rapidity of innovation in the new economy has another very important institutional implication. Federal courts are highly efficient by the standards of the American legal system. The federal court queue is short, and strong district judges can move even complex cases along briskly. But this is speaking relatively. Antitrust litigation moves very slowly relative to the new economy. Law time is not real time. The law is committed to principles of due process that limit the scope for summary proceedings, and the fact that litigation is conducted by lawyers before tribunals that are not technically trained or experienced inevitably slows the process.").

relevance under U.S. competition law, and, therefore, a ban on internet sales or absolute territorial protection may not be problematic even if such restrictions may eliminate intra-brand competition and parallel trade, provided that inter-brand competition is enhanced (and therefore consumer welfare and competitive market conditions are also enhanced).[302]

From a substantive viewpoint, unlike in the EU, U.S. competition law's generous approach to vertical online restraints allows the manufacturer to impose a wide array of vertical restraints on its dealers. Vertical restrictions can be defended on two levels. The first is the manufacturer's unilateral *Colgate* right to only deal with those distributors it wishes, under terms agreed upon in advance. Second, in cases where *Colgate* does not apply, a manufacturer can safely rely on current U.S. antitrust doctrine, whereby non-price restraints imposed on distributors are unlikely to present a serious threat to overall market competition as long as there is no substantial market power at the upstream or downstream level, and inter-brand competition is promoted overall.

Admittedly, the complexity of EU competition law enforcement finds no equivalent in U.S. antitrust enforcement. Freedom to contract is still the leading principle. There are no blacklisted clauses or intricate exceptions, and manufacturers do not have to care about different principles regulating specific distribution channels (online vs. offline) or distribution systems (exclusive vs. selective). More simply, the same rules apply to any form of "restricted distribution" under U.S. competition law.[303] As Judge Posner notes, such restrictions take many

[302] *But see, e.g.*, *Antitrust Law of Vertical Restraints, supra* note 261, at 83-136. According to Grimes, intra-brand competition is important since it would preserve entry opportunities for new retailers and new retailing approaches by preserving one of the new entrant's most potent competitive tools: the ability to discount popular branded items that draw customers. Similarly, other commentators note that once a consumer has made the decision to buy a particular brand, intra-brand competition is the only kind that really matters in such instances. *See* Harbour, *supra* note 28.

[303] Posner, *The Next Step*, *supra* note 259, at 10 ("A marketing system in which the manufacturer places restrictions on competition among the distributors or dealers that provide its goods either to lower links in the chain of

forms, although essentially all of them "limit or, more precisely, alter or channel intra-brand competition between distributors of a single brand."[304]

In particular, they may take the form of territorial restraints, that limit a distributor's ability to sell outside an assigned territory or from a different location, or customer restraints, that limit the ability to sell to certain categories of buyers. However, as the U.S. Supreme Court recalled in *Business Electronics*, the breadth of vertical non-price restraints that a dealer must accept in order to qualify for a franchise may include standards in its advertising, promotion, and product display, and provisions for repair and maintenance services in order to protect the goodwill of the manufacturer's product.[305]

C.1 *Restricted Online Distribution: Territorial Limitation of Online Sales/Advertising*

Territorial restrictions of online sales are probably the first and most evident area that distinguishes U.S. and EU competition laws in vertical enforcement.

As noted, absent single internal market concerns, not only is there no equivalent under U.S. competition law to the intricate and complex EU rules to detect active and passive online sales[306], but, more fundamentally, even absolute territorial protection may be not as problematic, provided that inter-brand competition is sufficiently enhanced.

The counterfactual to assess territorial restraints merely focuses on factors relating to the economic rationale of territorial restraints, namely whether such clauses provide the right incentives to distributors such that distributors can establish effective market penetration, invest

distribution or to the ultimate consumer.").

[304] *Id.*

[305] *See Business Electronics Corp.*, 485 U.S. 717.

[306] It was noted above that the distinction between active and passive selling is pivotal in determining whether a certain restraint on the use of the internet to sell or promote products breaches EU competition law, insofar as manufacturers (and their distributors) may partition the internal market and exclude parallel trade.

in services to customers, and, ultimately, compete more effectively with other brands.[307]

This is an area of U.S. competition law where the principles are quite clear, so territorial restraint clauses are hardly challenged. In essence, clauses such as exclusive territories, location clauses,[308] or areas of primary responsibility arrangements are all territorial restrictions that U.S. courts have generally upheld as legitimate means to spur inter-brand competition.

In particular, exclusive territorial protection, meaning the prohibition of "active and passive" selling, may be conferred if it enhances inter-brand competition.[309] Clearly, due to its nature, airtight restrictions may require a more thorough assessment of market conditions than in circumstances where more flexible territorial restrictions are at issue.[310]

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[307] Ryko Manufacturing v. Eden Services, 823 F.2d 1215 (8th Cir. 1987) (in upholding an exclusive territory restraint, the court reasoned that, "in dealing with vertical nonprice restraints the focus of antitrust concern is the impact of a particular restraint on interbrand competition, rather than its impact on intrabrand competition. Id., at 52 n. 19, 97 S. Ct. at 2558 n. 19; see also Copy-Data Systems, 663 F.2d at 409. This is especially true in cases where substantial competition in the interbrand market provides a check on the exploitation of intrabrand market power by providing a ready supply of adequate substitutes to consumers"). *But see* Generac Corp. v. Caterpillar, Inc., 172 F.3d 971 (1999) ("merely offering a rationale for a vertical restraint will not suffice; the record must support a finding that the restraint in fact is necessary to enhance competition and does indeed have a pro-competitive effect.").

[308] A location clause regulates the place from which the distributor is authorized to sell a supplier's product or services, but it allows the dealer to attract and sell to customers regardless of where they reside. Such restrictions are primarily useful for distributors engaged in on-premises sales and not with respect to products sold door-to-door, through the mail or online. Such clauses have been uniformly upheld, frequently as a matter of law, and have rarely been challenged in the last decade. *See* Salco Corp. v. General Motors Corp., 517 F.2d 567 (10th Cir. 1975); Munster Butane, Inc. v. Stewart Co., 651 F.2d 292 (5th Cir. 1981). See Emporium Drug Mart, Inc. v. Drug Emporium, No. 71-114000126 (Dallas, Tex. Sept. 2, 2000), where an arbitration panel was confronted with the issue of whether the DrugEmporium.com website effectively constituted a competing "store" within the meaning of the franchise agreements. The franchisor argued that although the website was advertised as a "drug store" for marketing purposes, in reality it was not a drug store as that term was defined in the franchise agreement. The franchisor reasoned that its website, while offering the same products as sold in the franchisees' "brick-and-mortar" stores, was not a store but an alternative means of distribution, because its method of operating was entirely different. In granting the franchisees' request for injunctive relief, the panel found that the franchisor held its website out to be a drug store in advertisements and SEC filings. Moreover, the panel noted that prior to the inception of the website, the franchisor had honored the franchisees' territories, such that the parties' reasonable expectations were that the franchisees would not be forced to compete with direct drug sales by the franchisor.

[309] *See, e.g.*, *Ryko Manufacturing*, 823 F.2d 1215 (upholding exclusive territory restraint); *Business Electronics Corp.*, 485 U.S. 717 (the Supreme Court recalled that, "In Sylvania, the Court refused to extend per se illegality to vertical non-price restraints, specifically to a manufacturer's termination of one dealer pursuant to an exclusive territory agreement with another.").

[310] Pitofsky defines "airtight" territorial or customer allocation as absolute restrictions, where the dealer has exclusive rights with respect to that supplier's product or service in the designated area of sale. Robert Pitofsky, *The Sylvania Case: Antitrust Analysis of Non-Price Vertical Restrictions*, 78 COLUM. L. REV. 1, 4 n.10 (1978). Pitofsky

Interestingly, though, under U.S. competition law, even in cases where the manufacturers' market share is significant, territorial restrictions that fall short of absolute territorial protection, like active sales into other distributors' exclusive territories, are nonetheless permitted.[311]

Moreover, "quantitative measures," such as profit pass-over arrangements[312] and even RPM clauses, may be imposed to enforce territorial restraints.[313]

As noted, the above approach applies equally, even when territorial restrictions of online

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and other commentators have suggested *per se* treatment for airtight restrictions. *Id.* at 28; William S. Stewart & Barry S. Roberts, *Viability of the Antitrust Per Se Illegality Rule: Schwinn Down, How Many to Go?*, 58 WASH. U. L. Q. 727, 758 (1980). The Court in *Generac Corp.* declined to adopt any rule that would ignore the totality of the circumstances in the case. However, it held that the nature of the intrabrand restraints is a highly relevant factor in rule of reason analysis. *Generac Corp.*, 172 F.3d 971. To the extent that intra-brand competition continues after imposition of intra-brand restraints, the effects of the intra-brand restraints on competition may be de minimis. Situations in which intra-brand competition continues to be vigorous differ dramatically from those where the effect of the intra-brand restraint is to shut off all intra-brand competition. *See, e.g.*, Muenster Butane, Inc. v. The Stewart Company, 651 F.2d 292, 298, 1981-2 Trade Cases 64 (defendant's efforts to restrict intra-brand competition largely ineffectual, intra-brand competition continued unabated); H & B Equipment Co. v. International Harvester Co., 577 F.2d 239, 246 (5th Cir. 1978) ("Rivalry from [the supplier's other dealers in the relevant market] makes this situation far different from the exclusive territorial arrangements which introduced the intrabrand competition concept into antitrust law.")

[311] *See, e.g.*, Cowley v. Braden Industries Inc., 613 F.2d 751, 1980-1 Trade Cases ¶ 63134 (upholding the restriction on sales outside the distributors' territory unless distributors were not "actively soliciting business outside their assigned territory" (manufacturer had 70% market share)).

[312] An area of primary responsibility ("APR") clause obligates a distributor to satisfactorily market the supplier's products in a defined geographic area. So long as it continues to do so, the distributor is not contractually restricted from selling the supplier's products outside such area. APR clauses have been regularly upheld, and have hardly been litigated since the 1970s. *See*, *e.g.*, Kestenbaum v. Falstaff Brewing Corp., 575 F.2d 564, 573 (5th Cir. 1978), *cert. denied*, 440 U.S. 909 (1979); Knutson v. Daily Review Inc., 548 F.2d 795, 807-10 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977). Although profit pass-over requirements do not restrict a distributor from selling outside its APR, such clauses do require a distributor who makes sales in another distributor's area to pay over a portion of the profits from such sales to compensate the distributor in whose area the sale was made for its presale marketing and promotional efforts and/or its post-sale services activities in the area. Such payment is designed to prevent "free-riding." The reasonableness of the compensation paid in relation to the services actually performed or reasonably expected to be performed by the non-selling distributor is a critical inquiry in evaluating profit passover arrangements under the rule of reason. *See* United States v. Topco Assocs., 1973- 1 Trade Case (CCH) ¶ 74,391, at ¶ 93,798 (N.D. Ill.); Superior Bedding Co. v. Serta Assocs., 353 F. Supp. 1143, 1150-51 (N.D. Ill. 1972).

[313] Eastern Scientific v. Wild Heerbrugg Instruments, Inc., 572 F.2d 883 (1st Cir.) (upholding a resale price restriction used to enforce assigned territories, reasoning that the provision merely enforced the territorial restriction and created no incremental anti-competitive effect.), *cert. denied*, 439 U.S. 833 (1978). Judge Posner agrees with this approach based on the fact that, "to forbid a dealer or distributor to sell outside of its territory, when it is the only distributor or dealer of the manufacturer's brand in the territory, has if anything a greater adverse effect on intra-brand competition than fixing the price at which it may resell the product. The territorial restriction affects both price and service competition; the price restriction affects only price competition." *See* Posner, *The Next Step*, *supra* note 259, at 10.

sales are concerned. Besides, U.S. courts would likely acknowledge that an inherent feature of e-commerce is indeed that an online distributor can more easily draw customers from states or areas that the manufacturer may have allocated to other distributors, such that territorial restrictions of online selling (and advertising) may be a natural response to avoid having distributors lose the incentive to invest in marketing and advertising within their own territories.[314]

Advertising Restrictions. In this context, U.S. courts have further upheld advertising restrictions that may impact other distributors' marketing efforts, particularly when distribution is subject to territorial restrictions.

For instance, courts have previously upheld restrictions on advertising activities, such as a "brochures ban," which targeted territories outside a distributor's area of primary responsibility.[315] The same principle is equally applicable in the context of territorial restrictions of online advertising activities when the online advertising "targets" customers or territories allocated to other distributors. However, it does not help clarify what is probably an important, and yet specific, issue that concerns the internet context.

In fact, in the EU section above, it was observed that the real issue in the online space (particularly for manufacturers) is understanding the "triggering event" that, in practice, determines when online advertising (as well as selling) by a distributor breaches, for instance, the territorial exclusivity accorded to another distributor.

The solution adopted by the new EU competition rules is essentially to characterize

[314] See, e.g., the encroachment issues raised in *Emporium Drug Mart, Inc.*, No. 71-114000126.
[315] *See, e.g.*, Murrow Furniture Galleries Inc. v. Thomasville Furniture Industries Inc., 889 F.2d 524, 1989-2 Trade Cases ¶ 68,850 (Defendant unilaterally introduced a sales policy that emphasized "showroom" selling, set up, and warranty service. Dealers were required to establish large showrooms, displaying manufacturer's furniture in room-like settings. The policy was further complemented by a prohibition to advertise furniture outside the assigned areas of primary responsibility, i.e. a "brochure" ban, and a prohibition from selling furniture to out-of-state customers not physically present in the store at the time of sale.); *see also Cowley*, 613 F.2d 751.

online advertising as active or passive selling on the basis of a number of criteria,[316] which should help the manufacturer understand whether distributors are complying with the territorial restriction attached to their online advertising initiatives. Clearly, nothing would prevent U.S. antitrust law from following a similar approach or from finding an original solution to such issues. Besides, the U.S. case law that relates to the "minimum contact" test or "sliding-scale" principles (discussed above in the section on jurisdictional issues) already contains a useful basis for such purposes.

On the other hand, existing general U.S. antitrust principles may offer a pragmatic solution to these issues, such that an ad-hoc solution, albeit welcome, may be unnecessary. In fact, manufacturers may well rely on the information provided, even in the form of complaints, by other distributors. After all, distributors are best positioned to monitor compliance with territorial restrictions and can quickly alert the manufacturer if other distributors are actively selling or advertising in their own territories. Clearly, the "treat" of rivals' complaints, in such instances, and the resulting contract termination are better deterrents for distributors. U.S. case law has plenty of cases where complaints about distributors' breaches of territorial restrictions were not seen as problematic. In *Monsanto*, for instance, the U.S. Supreme Court acknowledged that distributors are an important source of information for manufacturers and that, in order to assure an efficient distribution system, manufacturers and distributors constantly must coordinate their activities to assure that their products reach the consumer efficiently.[317]

C.2 *Restricted Online Distribution: Sales Restrictions on Distributors*

[316] The distinction is, broadly speaking, between general and targeted online advertising.
[317] Monsanto Co. (Monsanto) v. Spray-Rile Service Corp, 465 U.S. 752 (1984) (reasoning that complaints about price-cutters are natural—and from the manufacturer's perspective, unavoidable—reactions by distributors to the activities of their rivals, particularly where the manufacturer has imposed a costly set of non-price restrictions). In the EU, discussions between the manufacturer and its distributors, especially if the latter complains about other distributors, are viewed with suspicion and may eventually give rise to anti-competitive agreements.

Other non-price restrictions that manufacturers may decide to impose on distributors, in order to compete more effectively against rivals' brands, are subject to similar considerations as those discussed above.

In particular, an outright ban on internet sales or the imposition of quality requirements are generally permitted under U.S. competition law when the manufacturer seeks to address free-riding issues, protect product brand reputation, or generally to improve the way its products compete with other brands. Similar concerns justify the ability to grant internet privileges only to selected distributors. Moreover, unlike in the EU, the manufacturer may also reserve the online channel for itself.

Prohibition to sell online. Under U.S. competition law, a ban on online sales will likely be upheld when a manufacturer independently adopts a purely unilateral policy and enforces it unilaterally and evenly, or, in case an agreement is deemed to exist, the manufacturer and/or the individual dealer involved do not have market power.

Unilateral Online Sales Ban. First, U.S. courts have long recognized that the manufacturer, acting unilaterally, has the unfettered right to: i) announce the conditions on which it will do business with its distributors, ii) unilaterally select the distributors and customers with which it will do business, and iii) ultimately cease to do business with any dealer who does not adhere to its terms and conditions.[318]

Accordingly, a manufacturer can refuse to supply its products to any online trader in the absence of an intent to monopolize.

Courts have generally upheld similar restrictions on resellers' business methods, such as

[318] United States v. Colgate & Co. (Colgate), 250 U.S. 300, 39 S. Ct. 465, 63 L. Ed. 992 (1919); *see also* F.T.C. v. Raymond Bros., 263 U.S. 565 (1924) (extending the *Colgate* doctrine to circumstances under which a dealer will do business with a supplier); New York v. Herman Miller Inc., No. 08 CV-02977 (S.D.N.Y. Mar. 25, 2008) (Stipulated Final Judgment and Consent Decree).

on mail-order and telephone sales, even when the refusal to deal with so-called "price-cutting" dealers is in response to complaints by other dealers as to the manner in which the undesired dealer does business.[319] Thus, policy changes to introduce an internet ban are also permitted.

For instance, in *O.S.C. Corp. v. Apple Computer*, Apple imposed a mail-orders (price discounters) ban, based on "free-riding" concerns.[320] The Court found that point-of-sale and post-sale technical service were necessary to protect the brand and to prevent free-riding and had no actual adverse effect on competition. The mere fact that the mail-order prohibition eliminated a form of intra-brand competition did not make it illegal.[321]

Agreements Not to Do Business with Online Distributors. In principle, an online selling ban may also be defended when it is part of a vertical agreement.

Assuming an agreement is found to exist, a manufacturer's agreement with individual dealers not to do business with online distributors should generally be upheld so long as the

[319] HL Hayden Co. v. Siemens Med. Sys., 879 F.2d 1005, 1014 (2d Cir. 1989) (termination of dealer for mail-order selling); Davis-Watkins Co. v. Service Merchandise Co., 686 F.2d 1190 (6th Cir. 1982) (refusal to sell to catalog showroom), *cert. denied*, 466 U.S. 931 (1984).

[320] O.S.C. Corp. v. Apple Computer, Inc., 792 F.2d 1464 (9th Cir. 1986). Apple marketed its products through a network of independent local retail outlets. Appellants were retail dealers of personal computers who specialized in mail order sales. They contended that, as a result of their vigorous and aggressive mail-order sales, other dealers complained to Apple of unfair price competition. Apple *thereafter* instituted a ban on mail order sales of its products, thereby *changing* its distribution methods. Dealers who continued to sell Apple products by mail were warned they would be terminated as authorized dealers. The district court found that Apple's only concern with prices pertained to its dealers' capacity to withstand erosion of profit margins caused by having to carry "free riding" mail-order dealers. O.S.C. Corp. v. Apple Computer, Inc., 601 F.Supp. 1274, 1287 (C.D. Cal. 1985); Computer Place, Inc. v. Hewlett Packard Co., 607 F. Supp. 822, 830-31 (C.D. Cal. 1984) (manufacturer's ban on mail-order sale of computers was held to be justified by the manufacturer's concern over free-riding by mail-order dealers). Such a concern is both legitimate and lawful. *See Monsanto*, 465 U.S. at 762-63 (manufacturer may lawfully ensure that distributors earn sufficient profits to pay for product service programs and to "see that 'free-riders' do not interfere"); JBL Enterprises v. Jhirmack Enterprises, 698 F.2d 1011, 1015 (9th Cir.) (dealers more likely to promote or service product if not worried about other dealers taking a "free-ride' on their efforts), *cert. denied*, 464 U.S. 829, 104 S. Ct. 106, 78 L. Ed. 2d 109 (1983); Winn v. Edna Hibel Corp., 858 F.2d 1517, 1520 (11th Cir. 1988) (termination of dealer for failure to maintain supplier's desired image for brand).

[321] In particular, the court noted that competition increased after the ban was adopted (as Apple increased the number of authorized dealers) and further dismissed appellants' argument that the mail order ban was unlawful, because it eliminated a form of intra-brand competition. Apple's argument that the mail order prohibition was imposed to ensure Apple's products were sold only by face-to-face transactions clearly goes far beyond the "simple" brick-and-mortar requirement admitted under EU competition law (the district court upheld Apple's restriction, reasoning that, "Mail order sales inherently cannot supply that necessary [sales support and after-sales servicing]"). *Apple Computer, Inc.*, 792 F.2d 1464.

manufacturer and/or the individual dealer(s) involved do not have market power.[322]

On the other hand, a vertical agreement or conspiracy aimed at excluding online sellers (absent any legitimate business purpose or redeeming virtue for the prohibition) that results from market power or some form of upstream/downstream coordination is likely to be found illegal. In this respect, a leading antitrust commentator has noted that in all circumstances that induce a manufacturer to accommodate dealers' interests by adopting a distribution restraint that brings dealers more profit than necessary for efficient distribution of a brand, the most common being individually powerful dealers or dealer cartels, the antitrust objection is not that the manufacturer is coerced but that competition is limited for an illegitimate end.[323]

For instance, a leading case is *Toys "R" Us, Inc. v. FTC*, which is an appeal brought against the Federal Trade Commission's decision that the U.S.'s largest toy retailer unlawfully enforced multiple vertical agreements in which each manufacturer promised the toy retailer that it would restrict distribution of its products to low-priced warehouse club stores, on the condition that the other manufacturers would do the same.[324] The Court of Appeals for the Seventh District

[322] *See, e.g.*, Euromodas, Inc. v. Zanella, Ltd., 368 F.3d 11 (1st Cir. 2004) (an agreement between a supplier and one dealer to terminate a price cutting dealer is lawful, absent an agreement to fix resale prices).

[323] Hovenkamp, *Vertical Restraints, Dealers with Power, and Antitrust Policy*, *supra* note 276; *see also* Steiner, *supra* note 285.

[324] Toys "R" Us, Inc. v. F.T.C., 5 Trade Reg. Rep. (CCH) ¶ 24,516 (FTC 1998), *aff'd*, 221 F.3d 928 (7th Cir. 2000). The toy retailer was held liable for having orchestrated a horizontal agreement among numerous toy manufacturers through creation and enforcement of multiple vertical agreements. The toy retailer's response to new competition from discounters such as Wal-Mart and Target generally entailed lowering prices and improving in-store presentations. When the warehouse clubs entered the market, however, the U.S.'s largest toy retailer pressured toy manufacturers to deny popular toys to price clubs or to sell to them only at less favorable terms than it was getting. On appeal, the court affirmed by holding that, although other conclusions were possible, there was substantial evidence to support the finding that the petitioner had created a horizontal agreement among toy manufacturers, rather than merely a series of separate, similar vertical agreements between the petitioner and various toy manufacturers, as urged by the petitioner. Additionally, the court held that the respondent's finding of market power did not require an extensive inquiry into the petitioner's market share, and that the petitioner had misconstrued the concept of free-riding (the costs of the services provided by Toys "R" Us were "folded" into the price of the goods the manufacturers charged, and thus the services were not "susceptible" to free-riding, the court found). In fact, in its decision, the FTC found that Toys "R" Us held market power, despite having less than a 20% market share, because of the dealer's large volume of purchases, its uniquely broad inventory, its important distribution support to suppliers, and the value of its coveted shelf space resulting from its deep purchases of suppliers' lines of products.

affirmed the decision and rejected the claim that the company was exercising its rights under *Colgate* to unilaterally choose the companies with which it wanted to deal, because the court found that the toy retailer repeatedly crossed the line from unilateral to concerted behavior in illegal ways. Interestingly, the court also rejected free-riding claims, on the basis that the costs of the services provided by the toy retailer were "folded" into the price of the goods the manufacturers charged, and thus the services were not susceptible to free-riding.

In a more recent case, the same toy retailer agreed to settle two connected lawsuits in which it was accused of pressuring manufacturers of baby products not to sell to online retailers that undercut the retail chain's prices.[325] In particular, Babies "R" Us demanded protection from internet discounting and threatened not to carry certain manufacturers' products unless each of the manufacturers agreed to prevent internet retailers from discounting them. Manufacturers applied various tools to prevent internet discounting, including the adoption of a unilateral dealer selection policy that banned internet-only retailers from selling the manufacturers' products altogether. Another tool was to enforce a minimum suggested resale price ("MSRP") policy that prohibited retailers who wanted to continue to sell the manufacturer's product from selling below the MSRP. Although the cases have been settled, it is clear that even unilateral policies may be subject to antitrust enforcement in such specific circumstances.

As a result of this decision, strong multi-branded dealers with even less than 20% market share may be at risk under the antitrust laws for their restrictions on suppliers that could be found to constitute unreasonable restraints on trade.

[325] *See* BabyAge.com v. Toys "R" Us, No. 05-6792 (E.D. Pa. May 19, 2008); McDonough v. Toys "R" Us Inc., No. 06-0242, 2009 WL 2055168 (E.D. Pa. July 15, 2009) (Toys "R" Us also agreed to pay a fine in a related settlement with the Federal Trade Commission). In the first case, online retailers BabyAge.com Inc. and Baby Club of America sued Baby "R" Us/Toys "R" Us and several manufacturers, arguing that they lost business because Toys "R" Us coerced manufacturers of high-end baby products into preventing internet dealers from selling their products. Purchasers of child car seats and baby strollers followed with a class action, claiming that they had to pay more to buy such products, because Babies "R" Us (Toys "R" Us) pressured the manufacturers of those products not to pay to online retailers that charged less than brick-and-mortar stores, thereby preventing the online retailers from discounting their products). The baby product manufacturers have also entered into settlement agreements. Although the details of the settlements are not public, the case is also particularly interesting, as it concerned not only U.S. manufacturers of baby products but also European manufacturers (notably Sweden and Italy), showing how important it is for foreign companies to comply with antitrust laws of jurisdictions where they do business.

A third case that illustrates the same type of issue from a different angle is the *Fair Allocation System* case, which concerned a so-called dealer's boycott, whereby an association of auto dealers settled charges that it threatened to boycott Chrysler if the car manufacturer did not agree to change its vehicle allocation system to restrict vehicle supply to discounters engaged in internet sales.[326]

These cases show that when vertical and horizontal issues are strictly intertwined, manufacturers and distributors may face the additional risk of having their distribution practices found illegal on the basis of the horizontal element[327] of the conspiracy (which is *per se* illegal), even when they claim to have acted unilaterally in compliance with *Colgate*.

Conferring Internet Privileges to Selected Distributors. A slightly different issue is whether the manufacturer, while not banning online selling altogether, may favor certain retailers with internet privileges, like the ability to advertise and sell online, not extended to others. The U.S. courts seem to believe that manufacturers can do so.

In *MD Products, Inc. v. Callaway Golf Sales Co.*, the U.S. District Court for the West

[326] In *In re* Fair Allocation System, Inc., 126 F.T.C. 626 (1998), Docket No. C-3832, a group of 25 Chrysler dealers in the Northwest U.S. was losing sales to another dealer that sold at low prices over the internet. The innovative dealer offered low, "no haggle" pricing and was among the first dealers nationwide to sell over the internet. The Internet enabled this dealer to sell to customers over a wide geographic area in eastern Washington, Idaho, and western Montana. To combat this new form of competition, the full price dealers established the "Fair Allocation System" ("FAS") and threatened to refuse to sell certain Chrysler models and to limit the warranty service they would provide particular customers unless Chrysler limited the allocation of vehicles to the internet seller. The goal of the boycott was to limit the sales of a car dealer that sold cars at lower prices and via a new and innovative channel -- the internet. FAS members constituted a "substantial percentage" of Chrysler dealers in the relevant market. Chrysler traditionally allocated vehicles based on each dealer's total sales. FAS members wanted Chrysler to allocate vehicles based on the expected number of sales from a dealer's local area, which would have substantially reduced the number of cars available to Internet sellers. The FTC charged that the agreement to boycott Chrysler was a *per se* violation of Section 5 of the FTC Act and would have harmed competition and consumers by reducing competition among automobile dealers and depriving consumers of local access to particular models and warranty work. The order settling the complaint prohibits FAS from participating in, facilitating, or threatening any boycott of, or concerted refusal to deal with, any automobile manufacturer or consumer.

[327] *See* Toledo Mack Sales & Service, Inc. v. Mack Trucks, Inc., 530 F.3d 204 (3d Cir. 2008) (finding that the *per se* rule applied to the horizontal portion of the conspiracy, but the rule of reason applied to the vertical portion, even if plaintiff alleged that the purpose of the vertical agreement between a manufacturer and its dealers is to support illegal horizontal agreements between multiple dealers). A *Colgate* defense that there was no agreement was raised and rejected in this case.

District of North Carolina held that unilateral action by manufacturers in setting policies for distribution of their product "without seeking agreement," including a prohibition of dealers from reselling on the internet, is not a restraint on trade.[328] This is nothing new under *Colgate.*

In this case, golf clubs manufacturer Callaway instituted a policy that no longer allowed certain retailers to *advertise* on Callaway's website *and to sell* Callaway's products on their own websites or on e-Bay unless such retailers complied with the terms of its policy. The court held that the decision to restrain the plaintiff from either advertising on Callaway's website[329] or selling the products from its own web portal, and on e-Bay, was an independent, unilateral policy in which Callaway selectively permitted certain retailers with substantial logistic capabilities to distribute certain products over the internet.[330]

The judgment seems to confirm that courts will not generally venture into micro-managing what manufacturers can or cannot do, leaving the business decision to them;[331] thus, as

[328] MD Products, Inc. v. Callaway Golf Sales Co., 459 F. Supp. 2d 434 (W.D.N.C. 2006). Plaintiff, a retail golf store (MD Products), brought suit against defendant Callaway Golf Sales Company for violation of North Carolina antitrust laws and related statutes. The North Carolina antitrust statute, N.C. GEN. STAT. § 75-1 (2010), is modeled after the Sherman Act, 15 U.S.C. § 1. The court further held that the manufacturer's policy did not constitute a concerted action, even if plaintiff had acquiesced to it.

[329] Manufacturers may also post the list of authorized distributors on their own website and post disclaimers informing consumers about the risks associated with purchases from unauthorized channels, such as unauthorized internet sellers. *See*, *e.g*., Worldhomecenter.com, Inc. v. KWC America, Inc., No. 10 Civ. 7781 (NRB) (S.D.N.Y. Sept. 15, 2011) (The disclaimer provided: "[w]e cannot assist with problems that may occur from purchases from unauthorized channels, this includes online auctions and online purchases from dealers other than those listed in our Where to Buy. We require proof of purchase when processing warranty claims. This means: No Internet Selling, No Mail Order Sales, No Mass Merchants.").

[330] The court's reasoning may be a bit controversial, because the policy essentially applied to an existing customer who was, for two and one-half years, free to sell Callaway Golf products at discount prices and in any manner it chose, meaning it could sell through the internet, newspaper, or other channels. Callaway instituted its New Product Introduction Policy ("NPIP") due to concerns that retailers were using discounted Callaway products to attract customers, then using a bait-and-switch tactic to steer the customer towards a cheaper brand said to be comparable to Callaway. Callaway, therefore, decided to use only full-price retailers, not discounters. The NPIP provided that Callaway would sell its new products only to retailers that sold directly to golfers (not on the "gray market") that complied with all laws and did not discount the products, engage in bait-and-switch selling, or disparage the Callaway product. Thus, the plaintiff was informed that Callaway's new internet policy would prohibit the plaintiff from advertising on Callaway's website and from selling Callaway products on its own website or on e-Bay. The NPIP expressly stated that Callaway was not seeking any agreement on price with retailers.

[331] For instance, in 1999, NIKE signed a deal with internet sporting goods retailer Fogdog Sports that allowed Fogdog to sell the entire NIKE product line on its website. Fogdog was given exclusive access (among internet-only

long as the manufacturer imposes its policy unilaterally and evenly and can articulate compelling pro-competitive reasons for doing so, it can confer any type of internet privileges to those distributors who meet its requirements, thereby excluding those who do not.

Similar restrictions, namely the privilege conferred on only some distributors to sell online, may also be part of an agreement between the manufacturer and its distributors. In particular, U.S. courts have upheld so-called "non-authorized sales policy," or anti-bootlegging restrictions, pursuant to which the manufacturer discourages sales by its distributors to anyone other than ultimate consumers, with the only permissible exceptions being transfers between authorized dealers.[332] As a result, the underlying rationale for this restriction may justify that online sales may be permitted only by the authorized distributors to end users, provided that distributors refrain from supplying unauthorized professional resellers.

Reservation of Online Sales by the Manufacturer - Dual Distribution. In addition to maintaining their traditional sales channels through distributors, some manufacturers may wish to make internet sales directly to retailers and end users.

In contrast to the EU competition rules, which prohibit the reservation of the online channel by the manufacturer, under U.S. competition law, this practice is no different than the manufacturer's recognized ability to reserve certain national accounts or foreign sales for itself.[333]

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sellers) to the NIKE product line for six months in return for warrants to buy up to 12% of Fogdog's shares at a pre-IPO valuation. As part of the Fogdog deal, NIKE agreed not to sell to other virtual retailers. *See* Graduate School of Business, *Case Study: Nike, Channel Conflict* (Stanford Univ. Feb. 2000), https://gsbapps.stanford.edu/cases/documents/EC9B.pdf).

[332] *See, e.g.*, Sports Ctr. v. Riddell, Inc., 673 F.2d 786, 790–92 (5th Cir. 1982) ("The non-authorized sales practice, characterized by Riddell as "bootlegging," was defended by Riddell as a part of its concern and response to products liability exposure and to its competitive efforts." The court held that, "Riddell was entitled to impose and enforce a reasonable anti-bootlegging policy."); *see also* Parsons v. Ford Motor Co., 669 F.2d 308, 313 (5th Cir. 1982).

[333] The White Motor Company v. United States, 372 U.S. 253 (1963); *see also* Bruce Drug v. Hollister Inc., 688 F.2d 853, 856-57 (1st Cir. 1982), 1982-2 Trade Cases ¶ 64,941; International Logistics Group v Chrysler Corp., 884

The manufacturer's reservation of the online channel for itself may be challenged by unhappy distributors who may feel threatened by such direct competition.

For instance, the ability for a manufacturer to reserve online sales for itself was recently disputed in an antitrust action against mattress manufacturer Tempur-Pedic, where the plaintiff argued, *inter alia*, that the dual distribution system employed, where the manufacturer sold mattresses through both its authorized distributors and its own website, constituted a horizontal price-fixing conspiracy.[334] The court of appeals concurred with the district court in dismissing the horizontal price fixing claim on the basis that courts generally view manufacturer-distributor chains as vertical (and are thus subject to the rule of reason), not horizontal, in nature.[335] In dismissing the claim, the court further reasoned that the plaintiff did not allege a freestanding horizontal agreement solely among the manufacturer, *in the role of distributor*, and its distributors.

An example of this kind of agreement is the popular e-commerce agreement that concerns co-branded websites, like the "Mirror Hosting Agreement" between online bookseller Amazon and brick-and-mortar bookseller Borders (now in bankruptcy), which was subject to

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F.2d 904, 58 U.S.L.W. 2187, 1989-2 Trade Cases ¶ 68,744 (where the court upheld, under the rule of reason, Chrysler's policy to reserve to itself the international market and to reject all purchase orders from distributors who refused to comply with its marketing conditions, namely to conform with Chrysler's export program and to desist from reselling the discounted export units to Chrysler domestic dealers).

[334] Jacobs v. Tempur-Pedic Int'l, Inc., 626 F.3d 1327 (2010), 2010-2 Trade Cases ¶ 77,250, 78 Fed. R. Serv. 3d 41, 22 Fla. L. Weekly Fed. C 1581.

[335] *Jacobs*, 626 F.3d 1327. The court recalled that it examines the circumstances of each dual distribution arrangement to see whether it more closely resembles a horizontal or vertical agreement. The recent trend, however, has been "to view the primary relationship between a dual distributor and an independent franchisee as vertical where the restrictions do not lessen interbrand competition or decrease the availability of goods or services." *See, e.g.*, Graphic Products Distributors v. Itek Corp., 717 F.2d 1560, 1576 (11th Cir. 1983); Abadir & Co. v. First Miss. Corp., 651 F.2d 422, 427-28 (5th Cir. 1981); Hesco Parts, LLC v. Ford Motor Co., No. 3:02 CV-736-S, 2006 WL 2734429, at *4-5 (W.D.Ky. Sept. 22, 2006); *see also* Bedi v. Hewlett-Packard Company, No. 07-12318-RWZ (D. Mass. Nov. 17, 2008); Midwestern Waffles, Inc. v. Waffle House, Inc., 734 F.2d 705, 720 (11th Cir. 1984) (per curiam).. Professor Areeda also notes that most recent cases have classified dual distributorships as vertical relationships subject to the rule of reason. *See* AREEDA & HOVENKAMP, *supra* note 68, at 70-71. But some cases have classified dual distribution relationships as horizontal in character. *See, e.g.*, United States v. McKesson & Robbins, 351 U.S. 305, 313, 76 S. Ct. 937, 942, 100 L. Ed. 1209 (1956); Hobart Bros. Co. v. Malcolm T. Gilliland, Inc., 471 F.2d 894, 899 (5th Cir.1973).

antitrust litigation on the basis of allegations of market sharing between competitors.[336]

In this case, the plaintiff book customer brought an antitrust action against Amazon.com and Borders, alleging that their agreement eliminated competition between two former rivals in the market for online sales of books, which resulted in consumers being denied a competitive choice for their online book purchases. Although the court could not ultimately determine whether the defendants agreed to split the market, the case provides some useful input on how courts might analyze antitrust claims in similar instances.

In essence, the court could have held that no conclusive evidence had been adduced by either the plaintiff or the defendants regarding the appropriate market definition, so, absent a proper market definition, it could not determine whether the agreement constituted illegal market sharing. In fact, Amazon alleged that the market included "books sold in all venues," whereas the plaintiff, in turn, pointed to a separate and distinct "online market segment."[337] Interestingly,

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[336] *See, e.g.*, Gerlinger v. Amazon.com, 311 F. Supp. 2d 838, 2004-1 Trade Cases ¶ 74,363 (2004). In 2001, Amazon and Borders executed a "Syndicated Store" agreement (the "Agreement" or "Mirror Site Hosting Agreement") under which they would jointly re-launch *www.borders.com* as a co-branded website operated by Amazon. Under the Agreement, Amazon.com unilaterally determined the selection of products, offered the terms of sale and the prices for the books sold on the web site except for those books available for in-store pickup at a Borders brick-and-mortar store. In turn, Borders set the price for books to be purchased online but picked up in its stores. While Amazon was the actual seller of the books sold on the website, and accordingly retained proceeds for those sales, Borders paid Amazon.com a one-time fee for creating the website and Borders received a commission on each sale. Amazon and Borders asserted that the Agreement did not restrict any other sales activity of Borders, such as off-line sales of books, use of the Bordersstores.com website for shoppers to reserve books for in-store pick up, or Amazon.com's right to build brick-and-mortar stores if it chose. Defendants further argued that the agreement involved only an ancillary restraint in the context of an integrative venture with pro-competitive goals and effects that had to be judged according to the rule of reason.

[337] *But see* National Ass'n of College Bookstores, Inc. v. Cambridge University Press, 990 F. Supp. 245 (1997), 1997-2 Trade Cases ¶ 71,991, *motion to dismiss denied*, 1998-1 Trade Cases ¶ 72,034. In a Robinson-Patman Act case, the association of over 3,000 college bookstores alleged that all its members were in competition, *inter alia*, with favored purchaser internet-based book retailer Amazon.com. They claimed that Amazon.com could be proven to be an omnipresent competitor. The court agreed: "… the presence of Amazon.com as a competitor is relevant: because it is alleged to compete in every retail book market in which there are customers with internet access, allegations detailing specific geographic markets on a store-by-store basis are of diminished value." *Id.* at 253. *Contra In re* Digital Music Antitrust Litig., 06 MDL No. 1780 (S.D.N.Y. July 18, 2011) (case concerned an alleged conspiracy to inflate and maintain supra-competitive pricing in the digital music market. The U.S. District Court for the Southern District of New York found that while digital music purchasers have standing, the CD-purchaser plaintiffs do not, "as the complaint concedes that digital music and music sold on CDs are not substitutes.").

though, in dismissing the plaintiff's motion for judgment, the court incidentally observed that if the market actually included "books sold in all venues," "then the court would find no clear per se market allocation."

With regard to dual distribution, an interesting issue was brought before an arbitration panel in Texas about whether a franchisor could sell directly to customers online within the franchisees' territories.[338]

In that case, the arbitration panel ordered the franchisor not to sell products over the internet to customers located within the exclusive territories of its franchisees, reasoning that the franchisees did in fact have a reasonable expectation that they would not be forced to compete with direct online sales of the franchisor. Furthermore, the panel held that online selling within the franchisees' territories would result in customer confusion and might dilute the value of the franchisees' trademark licenses.

If the principles of the arbitration panel's order were upheld in cases before U.S. courts, then the result would be that e-commerce encroachment could occur not only on a geographical basis, but also by the development of internet sales and, consequently, that franchisees may challenge franchisors who sell goods and services via the internet to customers located within franchisees' territories.

C.3 *Restrictions of Online Advertising (Discussed Further)*

The foregoing discussion confirms that the general approach of U.S. antitrust law is consistently that internet characteristics do not require a departure from established principles

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[338] *See* Emporium Drug Mart, Inc. v. Drug Emporium, No. 71-114000126 (Dallas, Tex. Sept. 2, 2000). The franchise agreement under which the franchisees operated contained a territorial exclusivity provision, but did not regulate the respective rights of the franchisor and its franchisees to engage in sales and competition on the internet. Subsequently, the franchisor began operating a website in those territories and offered similar items for sale. The arbitration panel held that the franchisor was breaching the franchise agreements by engaging in these activities.

applied to assess all vertical restraints.

U.S. courts recently confirmed that such established principles apply equally to online advertising, despite how online distributors specifically sought to draw the courts' attention to the fact that, on the contrary, restrictions of online advertising require a more subtle scrutiny than traditional forms of advertising and promotion.[339]

In brief, all restrictions of online advertising have thus far been regarded as legitimate means to maintain the image of the brand and, ultimately, to enhance inter-brand competition (though the restrictions may indirectly shield brick-and-mortar distributors from price cutting internet retailers).[340] By now, it should be quite clear that the approach is, as with all vertical restraints, rather "generous," since manufacturers are ultimately free to impose any restriction that they deem necessary or advantageous. In this respect, it is interesting to note that U.S. authorities actually have the converse concern that restrictive regulation of online advertising in other jurisdictions (outside of the U.S.) may result in market insulation.[341]

Outright Ban of Online Advertising. In principle, the ability to ban internet sales does not automatically mean that an outright ban of online advertising is equally possible. While such a possibility may not be ruled out, it is more common that manufacturers will restrict certain forms of online advertising by allowing, for instance, advertising on the manufacturer's website

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[339] Worldhomecenter, Inc., v. L.D. Kichler Co., 2007 U.S. Dist Lexis 22496 (E.D.N.Y. Mar. 28, 2007); Worldhomecenter.com, Inc. v. KWC America, Inc., No. 10 Civ. 7781 (NRB) (S.D.N.Y. Sept. 15, 2011). In both cases, the courts relied on traditional schemes to assess minimum advertising policies on the internet; thus, the courts showed a lack of willingness to engage in the analysis of internet advertising (and selling) dynamics. See further discussion below on these cases.

[340] Advertising restrictions should not raise competition concerns, particularly where they are implemented unilaterally. *See, e.g.*, *In re* Nine West Group, File No. 981 0386, Docket No. C-3937 (May 6, 2008) (following the U.S. Supreme Court ruling in *Leegin*), *modifying*, 129 F.T.C., 2000 FTC LEXIS 48 (Apr. 11, 2000). The FTC recalled that Nine West was not prevented from establishing and maintaining cooperative advertising programs as long as such programs were not a part of a resale price maintenance scheme.

[341] *See*, ICPAC, FINAL REPORT, *supra* note 26, at 291-292. For instance, the Report suggests that laws that prohibit certain competitive practices, such as comparative or price advertising, could be used to ban websites that would compete with local businesses.

or on certain third party's platforms only to those distributors who comply with the terms and conditions established by the manufacturer.[342]

MAP and Other Content Restrictions in Online Advertising. The scope of control that manufacturers may exercise on advertising content is such that essentially any restriction, short of outright minimum resale price maintenance (which, in any case, is assessed under the rule of reason), is likely to be considered a reasonable restriction.

In fact, U.S. courts have upheld restrictions that allow the manufacturer to set a floor to the minimum *advertised* price.[343] This restriction is generally believed to not raise competition concerns, because the practice stops short of minimum resale price maintenance,[344] insofar as distributors would, in principle, remain free to set the final selling price.[345] Online distributors have argued, however, that such policies for e-commerce may encourage prices at levels advocated by the supplier (i.e. RPM), in contrast to what occurs in traditional retail.[346] While

[342] *See, e.g.*, MD Products, Inc. v. Callaway Golf Sales Co., 459 F. Supp. 2d 434 (W.D.N.C. 2006).

[343] The practice is also known as Internet Minimum Advertising Price policy (or "IMAP").

[344] *See* Blind Doctor, Inc. v. Hunter Douglas, Inc., No. C-04-2678 (MHP), 2004 WL 1976562, at *2 & n.5 (N.D. Cal. Sept. 7, 2004) ("Courts have long recognized that such advertising restrictions do not rise to the level of an antitrust violation;" the court concluded that the IAP cannot be the basis of a vertical RPM claim, because it does not restrain resale prices but merely restricts advertising.); Campbell v. Austin Air Sys., 423 F. Supp. 2d 61, 69-70 n.6 (W.D.N.Y. 2005); *see also Worldhomecenter.com, Inc.*, No. 10 Civ. 7781 (case concerning a violation of New York's antitrust statute, the Donnelly Act., N.Y. GEN. BUS. LAW § 340, which courts generally construe in accordance with its federal analogue, the Sherman Act, 15 U.S.C. § 1, upon which it was modeled. The court rejected the plaintiff's claim that the *per se* rule applies to Donnelly Act claims of vertical RPM); WorldHomeCenter.com, Inc. v. PLC Lighting, Inc., No. 10 Civ. 4092 (RJS), slip op. at 10 (S.D.N.Y. July 5, 2011); WorldHomeCenter.com, Inc. v. Franke Consumer Prods., Inc., No. 10 Civ. 3205 (BSJ), 2011 WL 2565284, at *4 (S.D.N.Y. June 22, 2011); State v. Tempur-Pedic Int'l, Inc., 30 Misc. 3d 986, 991, 916 N.Y.S.2d 900, 905 (Sup. Ct. N.Y. Cnty. Jan. 14, 2011); *see generally* Isaksen v. Vermont Castings, Inc., 825 F.2d 1158 (7th Cir. 1987) (the court posited that merely adhering to suggested retail prices does not establish an agreement to adhere; but, if the manufacturer employs coercive tactics or threats to achieve compliance, then a contract may be implicitly formed by "conduct in lieu of promissory language."), *cert. denied*, 486 U.S. 1005 (1988).

[345] However, FTC's David Balto observed that, "If the website is not simply an advertisement, but takes purchase orders as well… the prices listed are both part of the advertising and the equivalent of in-store price stickers, suggesting that the MAP restrictions would be the exact functional equivalent of resale price maintenance." *See* Balto, *supra* note 253.

[346] For instance, a New York-based online retailer of improvement products brought various actions claiming that Internet Minimum Advertised Price policy restricted retail prices and was, as a result, tantamount to illegal RPM. The online retailer contended that there is no distinction between advertised prices and resale prices on the internet. Its theory turned on a comparison with traditional brick-and-mortar retailers and thus called for a different approach.

these practices are generally upheld as legitimate restrictions, even when they are part of an agreement, manufacturers may eventually seek to rely on the *Colgate* defense.[347]

Words, Trademark, Pictures, etc. If the above practices are deemed reasonable, then it may be redundant to note that U.S. courts have also upheld restrictions on words, pictures, and brandmarks used in advertising, as well as restrictions on the types of media used to communicate advertisements.[348] Such restrictions are upheld, because they aim to convey a proper brand image.[349]

As a final remark on advertising restrictions, it is worth noting that, in most cases, distributors may also find it convenient to adhere to such restrictions if they are framed in the context of so-called cooperative advertising agreements, which are joint promotional efforts by manufacturers and retailers. Under such agreements, the manufacturer reimburses distributors' advertising costs, generally on the condition that published prices are at least as high as the company's suggested minimum advertised price; thus, if the prices fall below this minimum,

Two district courts reached different conclusions on the merits, but their approaches show a lack of willingness to analyze internet advertising (and selling) dynamics. In the first case, *Worldhomecenter, Inc.*, 2007 U.S. Dist LEXIS 22496, the court's finding that Internet Minimum Advertised Price policy restricted retail prices essentially relied on the plaintiff's assertion that, "… the policy directly impacts the resale prices for internet distributors. An internet shopper only sees the advertised price of products on a website such as Plaintiff's. That shopper does not have the capability of visiting a "bricks and mortar" store for further investigation into the product and the price because that store does not exist. Therefore essentially, the advertised price is the retail price for an internet shopper." *Id*. In a subsequent case, *Worldhomecenter.com, Inc.*, No. 10 Civ. 7781, the court reasoned its (opposite) conclusion by merely holding that, "the advertised prices on a website are not the only means an Internet retailer has at its disposal to communicate resale prices." *Id*.

[347] But see New York v. Herman Miller Inc., No. 08 CV-02977 (S.D.N.Y. Mar. 25, 2008) (Stipulated Final Judgment and Consent Decree), which required, *inter alia*, Herman Miller not to suspend or fail to fill orders of any dealer in order to coerce the dealer to adhere to its *suggested* retail price (without prejudice to "the unilateral right to terminate, suspend, or fail to fill orders of any dealer or reduce the supply of or discriminate in delivery, credit, or other terms provided to any Dealer for lawful business reasons..."). *Id*.

[348] Under U.S. trademark law, a franchisee only may use a franchisor's trademark in a manner that is authorized by the franchisor. A franchisee's rights relating to where or how it may use a franchisor's trademarks is principally a matter of contract law. With regard to the use of trademarks in advertising, trademark exclusivity clauses for use in particular markets or territories, have generally been found lawful under the rule of reason. *See, e.g.*, Generac Corp. v. Caterpillar Inc., 172 F.3d 971, 977-78 (7th Cir. 1999) (holding that a vertical arrangement that granted a party an exclusive license to sell products under a trademark in certain territories and restricted that licensee's ability to compete with the licensor in other territories did not violate § 1 of the Sherman Act).

[349] *See, e.g.*, People v. Tempur-Pedic Int'l, Inc., No. 400837/10 (N.Y. Sup. Ct. Jan. 14, 2011).

then the manufacturer is obligated to contribute nothing. Co-op advertising is generally considered lawful under the rule of reason.[350]

D. *Online Sales and the Robinson-Patman Act*

As anticipated, only a brief closing remark is dedicated to the Robinson-Patman Act (or "RPA").

In 1936, the U.S. Congress passed the Robinson-Patman Act specifically to protect small businesses from discriminatory pricing by manufacturers in favor of large chain stores. In essence, the RPA generally prohibits, in the absence of a recognized legal justification, a supplier from discriminating in price[351] or in providing promotional allowances and services[352] between two or more customers that compete in the resale of a supplier's products if the failure to do so may either cause the disfavored dealer to lose sales to the favored dealer or force it to lower prices to avoid the loss of such sales to the competing customer/reseller.

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[350] *See, e.g.*, *In re* Nissan Antitrust Litig., 577 F.2d 910, 917 (5th Cir. 1978) (co-op advertising program subject to rule of reason). In 1997, the FTC issued a policy statement stating that the Commission would treat MAP programs pursuant to the rule of reason, because they may be pro-competitive or competitively neutral, which stimulates dealer investment in promotion and benefits inter-brand competition; the FTC added that they would not prevent the dealer from "selling at discount prices or even from advertising discount prices at the dealer's own expense." *See* Federal Trade Commission Statement of Policy Regarding Price Restrictions in Cooperative Advertising Programs - Rescission, 6 Trade Reg. Rep. (CCH) ¶ 39,057 (Apr. 17, 1997).

[351] Under Section 2(a) of the Robinson-Patman Act, discrimination in price is essentially a price difference between at least two competing purchasers (secondary-line price discrimination). In a secondary-line claim a plaintiff must show that: (i) the seller conducted sales in interstate commerce; (ii) the seller discriminated in price between two buyers; (iii) the product sold to competing buyers was of the same grade and quality; and (iv) the price discrimination had an unlawful effect on competition. George Haug v. Rolls Royce Motor Cars, 148 F.3d 136, 141 (2d Cir. 1998) (citing Texaco, Inc. v. Hasbrouck, 496 U.S. 543, 556, 110 S. Ct. 2535, 110 L. Ed. 2d 492 (1990)); Maddaloni Jewelers, Inc. v. Rolex Watch U.S.A., Inc., 02 Civ. 6438 (SAS), 2003 WL 21507529, at *5 (S.D.N.Y. June 30, 2003). In Best Brands Beverage, Inc. v. Falstaff Brewing Corp., 842 F.2d 578, 584 (2d Cir. 1987), the court held that, "*In order to establish the requisite competitive injury in a secondary-line case, plaintiff must first prove that, as the disfavored purchaser, it was engaged in actual competition with the favored purchaser(s) as of the time of the price differential.*" *Id*. The actual time period that is deemed "contemporaneous" for purposes of the RPA will vary depending on the nature of the market for the goods in question. "*There is no need that the sales be made precisely at the same time or place.*" DeLong Equip. Co. v. Washington Mills Electro Minerals Corp., 990 F.2d 1186, 1202, *amended*, 997 F.2d 1340 (11th Cir.), *cert. denied*, 114 S. Ct. 604 (1993).

[352] Offering particular promotional opportunities only to online dealers or only to traditional retailers could be challenged by the disfavored dealers as a discriminatory allowance or service or facility under Section 2(d) or 2(e) of the Robinson-Patman Act. The Federal Trade Commission's Guides for Advertising Allowances and Other Merchandising Payments and Services provide guidance in interpreting these provisions. If a seller makes payments or furnishes services (e.g. any kind of advertising, catalogs, display materials, special packaging), then the seller must comply with some basic requirements. First, the payments or services should be available on proportionally equal terms to all competing customers. Generally, this can be done most easily by "basing the payments made or the services furnished on the dollar volume or on the quantity of the product purchased during a specified period. Second, if the payments or services are not functionally available to (i.e. suitable for and usable by) competing customers in the resale of the seller's products of like grade and quality, then alternatives that are functionally available should be offered to such customers. Third, the seller should take action designed to inform all competing customers of the existence of, and the essential features of, the promotion plan in ample time for them to take full advantage of the plan.

However, the RPA never gained much traction over the years, at least not from enforcement agencies.[353] The act's enforcement record is quite poor overall and future perspectives look grim. In fact, in its latest report from 2007, the Antitrust Modernization Commission actually recommended that the U.S. Congress should repeal the act in its entirety, reasoning that, "In its operation… the Act has had the unintended effect of limiting the extent of discounting generally and therefore has likely caused consumers to pay higher prices than they otherwise would."[354] U.S. courts have, in the past, recognized that there is also some tension between the objectives of the Robinson-Patman and Sherman Acts,[355] even though the two acts deal with distinct aspects of competition law. In fact, the Sherman Act looks to curb certain forms of illegal monopolies and conspiracies, while the RPA looks to protect smaller competitors by giving them the same access to discounts and other allowances that would otherwise be reserved for those commanding more buying power.

It is not the task of this paper to make recommendations about modifying or repealing this piece of U.S. antitrust legislation; indeed, it would probably be a lengthy exercise to get into the details of an act whose functioning is generally recognized as too complex and that has an uncertain future.

Therefore, the simple consideration to make here is that, while companies may be less concerned about public enforcement of the Robinson-Patman Act, they should still care about possible private actions until the act is actually repealed.

In fact, there is evidence of recent litigation (also concerning online distribution), largely in relation to Sections 2(a), 2(d) and (e) of the RPA,[356] which shows that buyers who are actually being discriminated against, in terms of discounts or promotional allowances or services granted, still find that the RPA can probably make more of a difference than the Sherman Act, at least in terms of deterrence.[357]

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[353] The FTC has hardly enforced the Robinson-Patman Act in the last 20 years.

[354] ANTITRUST MODERNIZATION COMMISSION, REPORT, *supra* note 294 ("The time has come to abandon piecemeal proposals for legislative changes to, or new court interpretations of, the Robinson-Patman Act. The Act is fundamentally inconsistent with the antitrust laws and harms consumer welfare. It is not possible to reconcile the provisions of the Act with the purpose of antitrust law; repeal of the entire Robinson-Patman Act is the best solution." The Commission justified its recommendation by stating that, "In its operation… the Act has had the unintended effect of limiting the extent of discounting generally and therefore has likely caused consumers to pay higher prices than they otherwise would. As one commentator has explained, the Robinson-Patman Act "was designed to protect small businesses from larger, more efficient businesses. A necessary result is higher consumer prices." Moreover, the Act ironically appears increasingly to be ineffective even in protecting small businesses.").

[355] *See, e.g.*, Great Atl. & Pac. Tea Co. v. F.T.C., 440 U.S. 69, 80-3, 99 S. Ct. 925, 59 L. Ed. 2d 153 (1979).

[356] Section 2(a) of the Robinson-Patman Act restricts the ability of sellers to charge different prices for goods of like grade or quality that they sell to competing buyers, and Sections 2(d) and (e) proscribe discriminatory promotional payments or services not made available to all customers on proportionately equal terms. Other sections in the Robinson-Patman Act prohibit *de facto* price discrimination that results from unearned brokerage payments (Section 2(c)), and buyers from knowingly inducing or receiving unlawful discriminatory prices (Section 2(f)).

[357] *See, e.g.*, *In Re* Brand Name Prescription Drugs Antitrust Litig., 1994 WL 240537 (N.D. III. 1994); Drug Mart Pharmacy Corp. v. American Home Products Corp., 472 F. Supp. 2d 385 (2007), 2007-1 Trade Cases ¶ 75,724; National Ass'n of College Bookstores, Inc. v. Cambridge University Press, 990 F. Supp. 245 (1997), 1997-2 Trade Cases ¶ 71,991, *motion to dismiss denied,* 1998-1 Trade Cases ¶ 72,034; The Intimate Bookshop, Inc v. Barnes &

After all, the discussion above shows that, under the Sherman Act's generous rule of reason, manufacturers do not have to be too concerned about complaints from "disciplined" distributors.[358] Such complaints are rare under the Sherman Act, if they are raised at all.

Accordingly, limitations on online selling that results from indirect measures, such as the application of less favorable conditions in terms of prices/discounts or the provision for different promotional allowances or services to distributors active in different distribution channels, would likely pass muster under the Sherman Act; this would be true even if such measures are meant to discipline distributors for selling successfully over the internet, particularly in territories where the manufacturer/other distributors charge higher prices, and ultimately to enforce RPM.

In the end, while the standard to assess RPM continues to evolve under the Sherman Act, it would probably be premature to deprive companies of a legal instrument like the Robinson-Patman Act that may still be used to tackle discriminatory measures intended to enforce RPM policies.

Noble, Inc., No. 98 Civ. 5564 (S.D.N.Y. Sept. 30, 2003); Computer Place, Inc. v. Hewlett Packard Co., 607 F. Supp. 822 (C.D. Cal. 1984).

[358] Admittedly, nothing in the Robinson-Patman Act prohibits manufacturers from choosing to refuse to deal with a particular customer, including online distributors.

Conclusive Remarks

The growing importance of online commerce highlights how vertical competition law enforcement is still an important building block of competition law policies, both in the U.S. and in Europe.

Nonetheless, there are differences in the way restrictions of online sales are assessed under EU and U.S. competition laws, respectively.

In essence, U.S. businesses will find that the rather liberal approach that U.S. competition law generally reserves for all distribution restraints, either offline or online, contrasts with the stricter approach of EU competition law.

The difference chiefly arises from the fact that achieving a single internal market is an additional fundamental policy goal that the European Commission seeks to achieve by enforcing the EU competition rules. This means that, unlike in the U.S., EU competition law still attaches significant importance to intra-brand competition, parallel trade, and the introduction of new forms of distribution. These factors contribute not only to improving consumer welfare and competitive market conditions, but they are also important to the achievement of the single internal market goal.

This may result in somewhat complex EU rules that require significant compliance efforts. The guidelines recently introduced by the European Commission are only a first step to help businesses comply with EU competition law.

One hopes that clearer rules will ultimately result in improved competitive conditions and an integrated internal market as well as provide consumers the ability to access a wider choice of products and better deals. Of course, one must wait to see whether such intertwined outcomes will result from voluntary business behavior or, instead, from more public or private enforcement in Europe.