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The Hardcore Restrictions on Internet Distribution under the Regulation 330/2010

The scope of Objective Justifications
and the Double Negative Presumption

Master's thesis in Commercial and Tax Law (EU Competition Law)

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Abstract

This thesis examines the approach and attitude towards restrictions on internet distribution in distribution systems under EU competition law. When the Regulation 330/2010 and the Vertical Guidelines entered into force in 2010 a new level of guidance was given by the Commission on internet distribution. The Vertical Guidelines made an important contribution with its detailed rules but did also leave some questions. In the case C-439/09, *Pierre Fabre Dermo-Cosmétique* which came in the late 2011 the COJ gave its first preliminary ruling concerning internet distribution and two of those questions are addressed and examined in this thesis.

The Vertical Guidelines state that distributors are generally free to use internet for sale and marketing purposes and the first question regards the scope of objective justifications for restricting internet distribution. The thesis shows that the Commission has taken a quite restrictive approach on restrictions on internet distribution which has, at least partly, been confirmed by the COJ. It is however possible to objectively justify restrictions with reference to foremost health and safety but also due to technically advanced and high quality products.

The second question concerns the double presumption rule mentioned in the Vertical Guidelines stating that an agreement containing a hardcore restriction is presumed to infringe Art 101(1) in the TFEU by not being exempted by Regulation 330/2010 and to not fulfill the criteria in Art 101(3) in the TFEU for being individually exempted. The examination of the rule and the analyze of case law gives that the COJ does not seem to take the presumption rule into consideration in regard of internet distribution. The conclusion is however that; restrictions together with any other directly or indirectly outright bans on internet distribution must be carefully constructed and performed.

Acknowledgement

When I started to dig into the depth of EU competition law and internet distribution the area of law seemed to be fast-growing, interesting and challenging due to the lack of cases but great importance of the issues. My initial image has been confirmed, especially concerning the challenge which became twice of what I expected. After some struggling I started to find keys to unlock the doors behind which I thought I would find answers and solutions but that was not the case. Instead, the opening of every door only led to four new doors that had to be unlocked. A quote from a lawyer cited in the Guardian described the area of competition law quite well when saying that “*With competition law, you're basically drawing a line in the water at a certain point in time. If you're on one side of the line, you're okay and if you're on the other you're breaking the law. The problem is that the water is moving all the time, so it's very hard to second guess which side of the line you'll fall on.*”¹

With these words I would like to thank some persons who have made significant contributions for the achievement of this thesis. First of all I would like to thank Berndt Axelsson for inspiring me to write my thesis within EU competition law. I would also like to show gratitude towards Thony Lindström at Mannheimer Swartling Göteborg for his support. I wish also to thank Urszula Sieradzka at Mannheimer Swartling Bryssel for her great commitment in challenging discussions and for participating in the interview. My group members Jonathan Karlsson, Haddis Akbari, Mandip Mahal and Jenny Palmroos together with tutor Roger Sandberg deserve also a thank you for have given me feedback during the writing of this thesis. Last but not least I will like to thank my fiancée for not leaving me although we have not seen each other in half a year!

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Daniel Glaad

¹ Unnamed lawyer cited in Gibson, O, What are the legal issues?, The Guardian, 25/2 2003.

Table of Contents

1	Introduction	1
1.1	Background	1
1.2	Purpose	3
1.3	Method and materials	3
	1.3.1 Method	3
	1.3.2 Materials	4
1.4	Delimitations	7
1.5	Outline	8
1.6	Introductory remarks concerning used terms	9
2	The EU Competition Law	10
2.1	Historical Background	10
2.2	The Internal Market	11
2.3	Hard v Soft EU Competition Law	12
	2.3.1 General	12
	2.3.2 Hard Law	13
	2.3.3 Soft Law	14
2.4	Legislation on Vertical Distribution Agreements	16
	2.4.1 Introduction	16
	2.4.2 Article 101(1)	16
	2.4.3 Article 101(2)	18
	2.4.4 Article 101(3)	19
	2.4.5 Regulation 330/2010	20
	2.4.6 The enforcement and sanctions of Article 101 TFEU	25
3	Distribution Agreements	27
3.1	Vertical and Horizontal Agreements	27
3.2	Vertical Distribution Agreements	27
	3.2.1 Non-exclusive Distribution Agreement Systems	27
	3.2.2 Selective Agreement Systems	28
	3.2.3 Exclusive Agreement Systems	29
4	Internet Distribution	30
4.1	The internet market within the EU	30
4.2	Potential effects of internet distribution	31
4.3	Prior legislation and debate	32
	4.3.1 Internet distribution under Regulation 2790/99	32
	4.3.2 The progress into the Regulation 330/2010	33
4.4	Internet distribution under Regulation 330/2010	35
	4.4.1 General	35
	4.4.2 All distribution formulas	37
	4.4.3 Exclusive distribution - Active and passive sales	38
	4.4.4 Selective distribution	39
4.5	Objectively necessary justifications	40
	4.5.1 Restriction by object	40
	4.5.2 Justifications	42
	4.5.3 Analysis	46
4.6	Presumption rules	52

4.6.1	General.....	52
4.6.2	The Double negative presumption.....	52
4.6.3	The Pierre Fabre case.....	53
4.6.4	Analysis.....	55
5	Conclusions.....	59
5.1	Objective justifications.....	59
5.2	The double negative presumption rule.....	60
	List of references.....	61

Abbreviations

2000 Vertical Guidelines	Commission Notice – Guidelines on vertical restraints [2000] OJ C291/1
COJ	Court of Justice of the European Union
Commission	European commission
DG Comp	Directorate General for Competition
EU	European Union
Member State	State that is a member of the EU
Pierre Fabre	Case C-439/09 Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la Concurrence and Others
Regulation 1/2003	Council Regulation (EC) 1/2003 on the implementation of rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1
Regulation 330/2010	Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices
Regulation 2790/1999	Commission Regulation (EC) No 2790/1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices
Vertical Guidelines	Commission Notice – Guidelines on Vertical Restraints [2010] OJ C130/1
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union

Appendix

Appendix 1	67
Appendix 2	68

I Introduction

I.1 Background

An important piece of today's competition legislation are the rules concerning distribution agreements between suppliers and distributors. As the globalized world has shrunk the markets and increased the amount of international companies, distribution agreements have become a useful tool for suppliers to control the way their products are distributed, marketed and sold. When companies grow in terms of market share and turnover, their distribution agreements are also more likely to have the capacity of restricting competition. The restriction or distortion of competition can jeopardize the internal market and has therefore been a hot topic within the European Union (the "EU").

In 2010, the new Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (the "Regulation 330/2010") and the new Commission Notice – Guidelines on Vertical Restraints [2010] OJ C130/1 (the "Vertical Guidelines") entered into force. The new Regulation 330/2010 was described as another step towards an economic approach on distribution agreements where the potential distortion of competition was weighed against the benefits that can be achieved by such agreements. The approach was followed from the previous Commission Regulation (EC) No 2790/1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices ("Regulation 2790/1999").²

As the Regulation 330/2010 was held quite short, the Vertical Guidelines have contributed to clarify what constitutes lawful and unlawful clauses in vertical agreements. According to the Regulation 330/2010 vertical agreements are presumed to be lawful under the block exemption as long as they satisfy the conditions laid down and do not include any of the hardcore restrictions stated in the blacklist. If an agreement is caught by containing hardcore restrictions it is presumed to be restricting to its object and the company instead has to prove that the pro-competitive benefits can outweigh the anti-competitive benefits and thus be exempted under Art 101(3) in the Treaty on the functioning of the European Union (the "TFEU")³. In the Vertical Guidelines the Commission of the EU (the "Commis-

² Wijckmans, F., Tuytschaever, F., Vertical agreements in EU Competition Law, Second Edition, Oxford University Press, Oxford, 2011, ("Wijckmans") p. 18.

³ Treaty on the Functioning of the European Union, consolidated version, OJ C 83, 30.3.2010.

sion”) has focused on particularly category management, retail price maintenance and relevant for this thesis online sales.⁴

The new Vertical Guidelines has contributed to give more guidance on the treatment of the internet in vertical distribution agreements. The detailed rules and narrow demarcations, especially regarding the internet, have also given raise to uncertainty on how to practically apply them. A failure in the interpretation of the rules can result in an agreement being considered as containing a hardcore restriction. The Vertical Guidelines are comprising but not entirely logical in all aspects and that has made it difficult for non-experts to understand its contents. This uncertainty has put market players in a situation where many of them have more or less directly used the wording in the Vertical Guidelines in their distribution agreements in order to ensure the lawfulness.⁵ This thesis aims to clarify the current legal position in two of these issues. Firstly, the Regulation 330/2010 does not expressly state anything regarding online sales, but mentions restrictions on active and passive sale in a selective distribution system as one of the hardcore restrictions. The Commission does categorize internet distribution as generally passive sales which mean that any agreement restricting internet distribution to its object is considered as a hardcore restriction listed in Art 4 in the Regulation 330/2010⁶. The Vertical Guidelines states further that agreements containing hardcore restrictions are presumed to infringe Art 101(1) in the TFEU and are presumed to not fulfill the criteria for being individually exempted under Art 101(3) in the TFEU, the so called double negative presumption.⁷ Secondly, the Vertical Guidelines state that all distributors must be principally free to use internet to sell products.⁸ On the other hand they also open up for possibilities to restrict internet distribution when objectively necessary,⁹ and it is uncertain what is actually justified under that paragraph and if there are any other ways of justifying any restrictions.

⁴ Wijckmans, p. 18. Karlsson, J., Fahlén, E., Nytt gruppundantag och nya riktlinjer för distributions- och andra vertikala avtal, Ny Juridik 4:10, Thomson Reuters, p. 34-39.

⁵ From an interview with Urszula Sieradzka, Associate at Mannheimer Swartling Brussel.

⁶ Art 4 in the Regulation 330/2010 is accessible in Appendix 2.

⁷ The Vertical Guidelines, Para 47. The existence of such a rule contradicts the principle that everyone is innocent until proven guilty.

⁸ The Vertical Guidelines, Para 52.

⁹ The Vertical Guidelines, Para 60.

The issues have raised current discussions mainly because of two reasons. Firstly, the Commission might have expanded the Art 4 in the Regulation 330/2010, through the Vertical Guidelines, to cover more than it was intended. Companies have been put in a more difficult position since they are not presumed to be exempted in regard of internet distribution. Another aspect is that the Vertical Guidelines are soft law and are thus not intended to be used for the change of law but rather to clarify the legal position within grey areas. Otherwise it might have effect on legal certainty as well as democracy in the law-making procedure.

1.2 Purpose

This thesis aims to determine how internet distribution in vertical agreements is affected by the Regulation 330/2010 and the Vertical Guidelines. The Regulation 330/2010 is especially examined in the light of objectively motivated hardcore restrictions and the double negative presumption that the Commission has set forth in its Vertical Guidelines. The double negative presumption means that an agreement containing any hardcore restriction will be presumed to not be exempted neither under the block exemption in Regulation 330/2010 nor under the individual exemption in Art 101(3) in the TFEU. The two questions that are aimed to be answered de lege lata are thus:

- What does generally amount to objectively necessary hardcore restrictions on internet distribution?
- Is there a double negative presumption on restrictions on internet distribution?

1.3 Method and materials

1.3.1 Method

Although the area of EU competition law is generally well covered with material as will be shown in the next subchapter 1.3.2 the Regulation 330/2010 is still relatively new. This means that the number of recent cases touching upon the internet distribution is few. With recent cases, I have in view those that have been decided under the rules in the new Regulation 330/2010. From a methodical perspective this means that the investigations need to make reference to older cases that are still relevant when defining the legal position after the Regulation 330/2010 entered into force. It is necessary to define the prior legal position regarding the central issues for the thesis in order to enable the analysis of the development that has been before Regulation 330/2010 and the Vertical Guidelines. This systematic procedure is of importance since guidelines, as a legal source, are only considered as soft

law and should be seen as clarifying the current legal position under the binding acts and case law.¹⁰

In order to answer the questions set out in the purpose in the right context a descriptive method is used in those parts where the EU competition law and distribution agreements are presented and described in general (chapter 2 and 3). In chapter 4 concerning the internet distribution a descriptive method is used in combination with some discussions throughout the chapter. The two main analysis directly related to the purpose is however dedicated to one sub chapter in the end of each part in 4.5.3 and 4.6.4.

To add a practical perspective on the investigation this thesis includes an interview with a lawyer, specialized on competition law, who works practically within the field of vertical agreements. This method is of course subject to individual opinions and impressions but can still be an input on whether there are any practical difficulties in the application of competition law in this aspect. The problem with the risk of getting input only from a consult perspective tried to be solved by involving company representatives as well. With regard to the sensitiveness of the subject it was difficult to explicitly refer to any private companies and their experience of the new rules why that has been left out. The interview does not have any decisive affection on the outcome of the thesis but have rather widened the scope on the subject.

The questions in the purpose are aimed to be answered *de lege lata*. In this thesis that means that each of the questions asks for what legal position can be interpreted from the legal sources as they stand today. That aim is not to examine what the legal position should be *de lege ferenda*. The analysis might however include reasoning based on how the legal position should be in those cases where no actual position can be established.

1.3.2 Materials

1.3.2.1 Materials in relation to the purpose

The competition law within the EU has been subject to heavy discussions since the nineties and the area is generally well-covered with written materials.¹¹ This study will make allowance to the primary and secondary legal sources with regard to Art 288 in the TFEU but practically start in article 101 TFEU. Article 101(1) and (3) constitute the primary source

¹⁰ Wijckmans, p. 26.

¹¹ Fox, E, *The Competition Law of the European Union in Comparative Perspective - Cases and Materials*, West, 2009, p. 198-199.

for the relevant part of the EU competition law and are together with the Regulation 330/2010 the essential legislation in this thesis.

During the descriptive part where the aim is to define the competition law context, case law plays an essential role. Concerning the definition on the general legal position on internet distribution the Vertical Guidelines is the starting point together with case law, where such exists, in order to complement the interpretation of the current Regulation 330/2010 and the earlier Regulation 2790/1999. For the both questions in the purpose the recent case that came in October 2011, C-439/09, Pierre Fabre Dermo-Cosmétique (“Pierre Fabre”) is fundamental in order to establish the legal positions since that is the first case coming before the COJ that concerns internet distribution. For the second question regarding objectively justified restrictions older cases are taken into consideration as well and examined in relation to the Pierre Fabre case. In relation to the Pierre Fabre case the Opinion Advocate General Mazak in Case C-439/09, Pierre Fabre Dermo-Cosmétique is of importance as well. The opinion is not legally binding but makes a significant contribution by giving more thorough reasonings and arguing than the COJ. Some skepticism might arise due to the fact that there is only one case to rely on as case law after the Regulation 330/2010 entered into force, but on the other hand has the broader view been made obtainable in the literature. Another aspect is that the Pierre Fabre case refers to the old Regulation 2790/1999 with the accompanying Commission Notice-Guidelines on vertical restraints [2000] OJ C291/1 (“2000 Vertical Guidelines”) instead of the today’s legislation relevant for this thesis. The two regulations both treat and define hardcore restrictions equally why the judgment is valid for the interpretation of the Regulation 330/2010 as well. The different versions of guidelines differ more from each other but they are not binding to any courts, only to the Commission itself. The COJ could therefore make reference to and observe the new Vertical Guidelines in its judgment if necessary.¹²

In order to understand the today’s legislation on internet distribution it is necessary to also consult the papers issued by the Commission on public consultation. These are no binding documents but contain the arguments put forward based on the opinions among strong

¹² See chapter 2.3.3 regarding soft law as legal source. DG Comp does also confirm this at <http://ec.europa.eu/competition/antitrust/legislation/legislation.html> 2012-05-04. Advocate General does also mention the possibility for the COJ to observe the Vertical Guidelines in Opinion Advocate General Mazak in Case C-439/09, Pierre Fabre Dermo-Cosmétique, (“Advocate General Mazak”) footnote 60 although they are ratio temporis.

market players that have made an important contribution and potential affection on the final legislation and policy making from the Commission.

When defining the legal position on internet distribution it is necessary to assess the Vertical Guidelines as the basis. These are therefore described and analyzed in order to answer the purpose of this thesis. This is the case especially for the issue regarding the double negative presumption for agreements containing one or more hardcore restrictions where the Commission's Vertical Guidelines are analyzed and compared to the judgment of the COJ in the Pierre Fabre case. Therefore the last important issue to discuss is the Vertical Guidelines' status as legal source. The question is relevant firstly because the Vertical Guidelines might have a great practical effect on vertical distribution agreements as closely connected to the interpretation of Regulation 330/2010. Secondly, it is important because the Vertical Guidelines are the major focus in the analysis. The intention is not to draw any conclusion or make any statement in regard of the Vertical Guidelines initially but rather to shape the contours along the writing. Hopefully the pieces have all fallen together in the end to a degree where the true status of the relevant parts can be clearly seen.¹³

1.3.2.2 Prior research

The EU competition law has been subject for a number of books and theses. "Vertical Agreements in EU Competition Law"¹⁴ by Frank Wijckmans and Filip Tuytschaever is together with "EU Distribution Law"¹⁵ by Joanna Goyder two essential books within EU competition on vertical agreements. These books cover the major parts of the legal basis for this thesis but are written quite generally.

Two earlier theses are relatively close connected to the relevant issues in this one. In "Selective distribution systems in practice: Consequences of and justifications for selective distribution together with effects of the new Block Exemption Regulation"¹⁶ by Eva Johansson, the general significant changes in the Regulation 330/2010 was analyzed from a practical perspective. In "Selective Distribution and Online Sales - the transformation of

¹³ The relation between hard and soft law is described in chapter 2.3.

¹⁴ Wijckmans, Tuytschaever, F., Vertical agreements in EU Competition Law, Second Edition, Oxford University Press, Oxford, 2011.

¹⁵ Goyder, J., EU Distribution Law, Fifth Edition, Hart Publishing, Oxford, 2011 ("Goyder").

¹⁶ Johansson, E., Selective distribution systems in practice : Consequences of and justifications for selective distribution together with effects of the new Block Exemption Regulation, Jönköping International Business School, Bachelor Thesis, 2010.

European Competition Law into the electronic society”¹⁷ by Marie Aronsson, the changes in regard of internet distribution were analyzed in the light of Regulation 330/2010 with the accompanying Vertical Guidelines. The latter one covers issues on vertical agreements and internet distribution similar to this thesis but only when it comes to determining what general legal position that can be concluded from the Regulation 330/2010 and the Vertical Guidelines. The intention with this thesis is instead to take the analysis one step further and determine the legal position especially on objective justifications and presumption rules that the Commission has set forth in the Vertical Guidelines and whether those are expressed for a normative rather than a descriptive purpose. Consequently, it is possible to clearly distinguish this thesis from what has been written before, not in terms of new competition law regulations or guidelines but rather on the perspective and focus on these issues.

1.4 Delimitations

The title reveals that the geographic focus in this thesis is limited to the EU. The problematization itself can also be referred to the EU as a unique mixing of 27 previously sovereign states that has given rise to it and now try to achieve an internal market. Except for the inevitable influence the author has got because of the citizenship and earlier law studies, neither the Swedish nor any other national legislation will be an intentional starting point. The EU law has solely constituted the legal foundation on which this thesis is written and the perspective from which analysis are made.

The Regulation 330/2010, as basis for this thesis, covers mainly vertical agreements. Even though it may also affect horizontal agreements,¹⁸ these are only mentioned to some extent. Horizontal agreements are mainly touched upon in order to distinguish it from vertical agreements in different situations. The purpose in this thesis is deeply rooted in Regulation 330/2010 and the Vertical Guidelines and these are only relevant for the treatment of Art 101 in the TFEU. Therefore, Art 102 in the TFEU lies out of the scope and will not be examined although it is central within the EU competition law.

On the blacklist in Art 4 in the Regulation 330/2010 there are several restrictions listed, but the focus of this thesis is limited to internet distribution and especially those questions pre-

¹⁷ Aronsson, M., *Selective Distribution and Online Sales - the transformation of European Competition Law into the electronic society*, Gothenburg University, Master Thesis, 2011.

¹⁸ Wijckmans, p. 93.

sented in the purpose. The delimitation was decided with regard to three factors. Firstly, internet has been an extremely fast-growing channel for distribution which has led to both possibilities and risks for companies. For sure there has also been a challenge for the legislator to balance. Secondly, it was necessary to limit the scope to one topic in order to make it coverable within the given time and space delimitation of the master theses. Thirdly, even though the Regulation 330/2010 is still fairly new the COJ gave a preliminary judgment in *Pierre Fabre* in the late fall in 2011 which shows the importance and unfortunately the legal uncertainty within the area.

The thesis does not have any specific product perspective and is rather general in that aspect. However, motor vehicles are not covered since such sales are regulated in the Commission Regulation (EU) No 461/2010 of 27 May 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices in the motor vehicle sector Text with EEA relevance.

1.5 Outline

The introductory chapter 1 is followed by chapter 2 which generally describes the EU competition law both historically and how it stands today. Since all EU competition law is basically founded on Art 101 and 102 in the TFEU a general overview is necessary in order to put the more specified rules in their right context, with exception to Art 102 due to the delimitations. Chapter 3 aims to present and distinguish the different forms of distribution agreements from each other to show why they are treated differently with regard to their effects on competition. The largest part of the thesis is chapter 4 which is dedicated to internet distribution specifically. The chapter gives firstly a broad view on the previous legislation and the debate that has resulted in the new Regulation 330/2010 and the Vertical Guidelines to show what interests have been represented in the creation of them. Further on, the new Vertical Guidelines are presented to the extent that they provide guidance on how to contract about internet in distribution agreements. Finally the two main issues for the thesis are described. Firstly, objectively motivated justifications are described and analyzed. Secondly, the presumption rules are described and analyzed. The thesis and especially the two questions presented in the purpose are then answered and given a conclusion in the chapter 5.

1.6 Introductory remarks concerning used terms

This chapter aims to give some guidance on the terms used in this thesis.

Internet distribution: Means the distribution that involves sales and advertisement over the internet. The term equals to online distribution but internet seems to be used more frequently in the Vertical Guidelines. Internet sales and advertisement are mainly used when the relevant issue relates to the sales or advertisement specifically.

Supplier: Means the part delivering the relevant product in the distribution agreement. Seller could also have been used but again the preferred wording is taken from the Vertical Guidelines.

Distributor: Means the part receiving the relevant product in the distribution agreement. Seller, dealer or retailer could have been used but for the avoidance of doubt and unnecessary limitations supplier seems to be the most covering term. The distributor cannot be the end-user or consumer of the product.

Exclusive distribution system: Means a system where the supplier appoints distributors to exclusively sell the relevant product within the specific area or to a specific customer group. This prohibits other distributors from actively sell or advertise the same products where there is exclusivity.

Selective distribution system: Means that the supplier sets up a system where only those distributors are allowed to sell and advertise the relevant products that fulfill the requirements and thereby are considered as authorized distributors.

Hardcore restrictions: Means those restrictions listed in Art 4 in the Regulation 330/2010, the blacklist.

Brick and mortar shop: Means a physical shop where products can be displayed, advertised and sold directly from the distributor to the customer.

2 The EU Competition Law

2.1 Historical Background

Since the beginning of the collaboration among the Member States of the EU, there has been an endeavor towards an internal market as expressed in art 3.3 Treaty on the European Union (“TEU”)¹⁹. The development has enabled for companies to take advantage of the, more or less, absence of economic frontiers by establishing their business on an international level. To uphold the internal market the EU competition law prevents distortion of competition. Within the competition law and distribution agreements in particular the EU has been quite restrictive. Especially distribution agreements that has tended to restrain products from crossing national frontiers have been seen as distortion of competition and thus been affecting the internal market negatively from an EU perspective.²⁰

Historically the EU law on distribution agreements has been very protective which has given rise to criticism with start during the nineties. The competition law became a highly debated area and a less restrictive approach was taken through the Regulation 2790/1999. The Regulation was issued by the Commission in 1999 to complement the central EU legislation for distribution agreements in Art 101(1) and 101(3) in the TFEU. The regulation was intended to adjust some earlier shortcomings that were presented in the Green Paper on Vertical Restraints in EC Competition Policy²¹. Some important changes were the adoption of an effect-based rather than a strict form-based approach with focus on market share and coverage of both final and intermediate goods.²² The attempt resulted in a more economic-oriented attitude and an acknowledgement that benefits might arise even out of agreements that on the face of it seem to put restraints on the competition.²³

When the Regulation 2790/1999 expired in 2010, the new Regulation 330/2010 entered into force. The Regulation 330/2010 and the Vertical Guidelines were described as another step towards an economic approach on distribution agreements and the potential distortion

¹⁹ Treaty on the European Union, consolidated version, OJ C 83, 30.3.2010.

²⁰ E. Fox, *The Competition Law of the European Union in Comparative Perspective - Cases and Materials*, West, 2009, p. 198.

²¹ European Commission, *Green Paper on Vertical Restraints in EC Competition Policy*, 22 January 1997.

²² Wijckmans, p. 17.

²³ E. Fox, *The Competition Law of the European Union in Comparative Perspective - Cases and Materials*, West, 2009, p. 200.

of competition was to be weighed against the benefits that can be achieved by such agreements.²⁴ Even though the new Regulation 330/2010 has not generally resulted in a total change of the rules there have been some important improvements. Firstly the market share limit of 30 per cent must since the change not be exceeded by neither the supplier nor the buyer, the so called double share threshold in Art 3.1 in the Regulation 330/2010. Secondly the accompanying Vertical Guidelines has given more detailed guidance on the Commissions approach and view on internet distribution.²⁵

2.2 The Internal Market

Art 3.3 in the TEU states that the EU shall establish an internal market and enable growth both at an economic and social level. Closely connected to the fulfillment of the internal market are the rules that uphold the four freedoms, i.e. free movement of: goods, persons, services and capital. The rules aim to make possible an effective competition by ensuring free movement for both products and services covered by the four freedoms.²⁶ By enabling for products and services to easily move from one Member State to another the consequence becomes that consumers will have a decisive position regarding the outcome for the companies. Thus the potential result, that favoring of one product will bring success to certain companies regardless of from which Member State it has its origins, will depend on the consumers. This illustrates one of the purposes with the internal market, to ensure that the progress within the EU market benefits the consumers.²⁷

In the internal market context the EU competition law has been an important part of the regulatory framework with one of its objectives to uphold the single market by restricting private actors from using agreements to affect the competition negatively. In line with the aims of the internal market, the competition law does also have as its objective to promote market efficiency on behalf of the consumers.²⁸ The consumer interest is clearly expressed in Art 101(3) Para 2 in the TFEU which states that an agreement, although it is constructed contrary to 101(1) in the TFEU, might be exempted if, in addition to the other criteria, the

²⁴ Regulation 330/2010, Preamble Para 6-7.

²⁵ Wijckmans, p. 18.

²⁶ Bernitz, U., Svensk och europeisk marknadsrätt 1, Konkurrensrätten och marknadsekonomins rättsliga grundvalar, 2 edition, Norstedts Juridik, Stockholm 2009, ("Bernitz") p. 23-24.

²⁷ Craig, P., De Burca, G., EU Law: Text, cases and materials, 4 edition, Oxford University Press, Oxford 2008, ("Craig, P., De Burca, G.") p. 605.

²⁸ Craig, P., De Burca, G., p. 951.

consumers are allowed a fair share of the resulting benefits. This condition is one of four cumulative ones and requires that eventual negative effects on the competition must be outweighed by the benefits owed by the consumers.²⁹ In summary, the EU competition law is essential to uphold the internal market as it helps balancing the competition that has been enabled by companies' growth thanks to the absence of internal frontiers.

2.3 Hard v Soft EU Competition Law

2.3.1 General

With reference to the method in chapter 1.3.2.1 it is central to distinguish hard law from soft law and what the legal consequences are of their contents. Hard law consists of primary and secondary legislation and in an EU competition law context the most relevant legal sources are Art 101 in the TFEU, the Regulation 330/2010 as described generally in Art 288 in the TFEU and judgments from the COJ. As the term reveals itself hard law binds all Member States while the role of soft law might be a little bit more confusing. Soft law sources are not legally binding in themselves but may still have practical effects.³⁰

When dealing with legal issues concerning distribution agreements it is essential to address the question on how different legal sources relate to each other. A vertical distribution agreement benefits from the exemption in Regulation 330/2010 as long as it complies with the requirements in it and does not contain any blacklisted clauses. Internet distribution is not touched upon in the Regulation 330/2010 at all while the Vertical Guidelines categories it generally under passive sales. According to Art 4 (b) in the Regulation 330/2010 restrictions on passive sales are considered as hardcore restriction and thus the valuation of the Vertical Guidelines as legal source is totally decisive when determining if clauses restricting internet distribution are part of the hardcore restrictions on the blacklist and thus constitutes an infringement of the EU competition law.³¹

²⁹ Goyder, p. 36.

³⁰ Wijckmans, p. 26. The different legal sources binding effect can be found in Art 288 TFEU (Regulations), Art 267 (COJ judgments)

³¹ Wijckmans, p. 27.

2.3.2 Hard Law

According to Art 3 pt. 1 (b) in the TFEU the EU shall have exclusive competence in establishing the competition rules necessary for the functioning of the internal market. When exercising the exclusive competence within the EU competition law it has resulted in e.g. Art 101 TFEU and Regulation 330/2010. As EU legislation has been given supremacy in the case *Van Gend en Loos*³² the TFEU binds all Member States.³³ The same applies to the Regulation 330/2010 by the wording in Art 288 Para 2 in the TFEU which states that a regulation shall have general application and be binding in its entirety and directly applicable in all Member States. The definition of ‘directly applicable’ has been debated, especially whether it can be directly applicable without taking into account *travaux préparatoires*, preparatory papers.³⁴ *Travaux préparatoires* have become an issue due to the fact that these were not published to the original treaties and should therefore not be a source for guidance.³⁵ The EU courts could otherwise have been willing to use them and they would certainly have effect on the possibility to make teleological or purposive interpretations. Regardless of the eventual lack of preparatory work the regulations are however binding when they enter into force and need not to be implemented by the Member States.³⁶ When it comes to interpretation of the treaties and regulations the COJ plays a central role since its decisions are binding for all Member States and form part of the hard law.³⁷

³² *Van Gend en Loos* (Case 26/62) [1963] ECR 1.

³³ The supremacy has since 2009 also been explicitly affirmed in Declaration 27 in the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community. See also Gerhard, P., Norinder, H., *Marknadsrättens grunder*, Gleerups, Malmö, 2009, p. 81.

³⁴ Craig, P., De Burca, G., p. 84.

³⁵ Craig, P., De Burca, G., p. 73.

³⁶ Craig, P., De Burca, G., p. 84.

³⁷ Hard law in EU competition law context includes also secondary legislation; see Goyder, J., p. 8-9. Wijckmans, p. 26.

2.3.3 Soft Law

While hard law consists of legally binding sources, soft law stands for “[...] *rules of conduct which, in principle have no legal binding force but which nevertheless may have practical effects* [...]”³⁸. Soft law is also a way for expressing EU policies as stated in Art 288 TFEU Para 5 where recommendations and opinions are mentioned as non-binding measures. Furthermore soft law can also be expressed by the means of inter alia green and white papers and guidelines.³⁹

In the context of vertical distribution agreements the Vertical Guidelines can be of great importance. The Vertical Guidelines express the principles to take into account when making assessments under Art 101 TFEU and the Regulation 330/2010 according to the Commission.⁴⁰ The Commission has constructed the Vertical Guidelines stating that they aim to enable for companies to make their own application of the Regulation 330/2010 in order to ensure that their vertical agreements are written in compliance with the EU competition law.⁴¹ In relation to the Regulation 330/2010 the contents in the Vertical Guidelines cannot alter its rules and principles but rather contribute to clarify and/or define certain terms or concepts.⁴² The Vertical Guidelines are however only binding to the Commission itself pursuant to the principle of legitimate expectations, *patere legem quam ipse fecisti*, the one who has created the law is itself bound to it.⁴³

When determining the role of the Vertical Guidelines in relation to third parties it is necessary to distinguish EU courts from other courts and authorities. The Vertical Guidelines have not prejudice to the case-law from neither the General Court nor the COJ regarding the assessment of Art 101 TFEU.⁴⁴ The Vertical Guidelines can still affect the interpretation in the EU courts but their judgments will prevail if any uncertainty arises. In regard of

³⁸ Snyder, F., *Soft Law and Institutional Practice in the European Community*, 1993, EUI Working Papers, Law No. 93/5 in, p. 197. Compare to White & Case L L P comments on the draft commission regulation on the application of article 81(3) of the treaty to categories of vertical agreements and concerted practices and the draft commission notice – guidelines on vertical restraints, p. 4. This view was also supported in the interview with Urszula Sieradzka, Associate at Mannheimer Swartling Brussel.

³⁹ Wijckmans, p. 26.

⁴⁰ The Vertical Guidelines, Para 1.

⁴¹ The Vertical Guidelines Para 3.

⁴² C-226/94 *Grand Garage Albigeois et al* [1996] ECR I-651, para 21.

⁴³ Wijckmans, p. 28. T-105/95 *WWF UK v Commission* [1997] ECR II-313, para 55.

⁴⁴ The Vertical Guidelines, Para 4.

national authorities such as national competition authorities and national courts the Vertical Guidelines are not binding as law. Thus the authorities are not under obligation to follow them due to the loyalty clause in Art 4(3) in the TEU since the Commission created them independently. From a practical point of view the Vertical Guidelines have nevertheless been treated or considered as black-letter law by national authorities, which means that they are generally accepted.⁴⁵ This view might also be supported by the fact that there are fairly few cases from the EU courts giving guidance since the new rules on vertical restraint came in 2000. The lack of judgments has paved the way for the Vertical Guidelines to become very influential.⁴⁶ In an earlier paper published by the Commission it states that guidelines, even though not binding on national authorities, make an important contribution since the Commission confirms the contents of it in its decisions in individual cases. If then affirmed by the COJ the guidelines then belong to the rules that need to be followed by the national authorities as well.⁴⁷

For so called market players the Vertical Guidelines are only binding in so far as its contents are in line with Regulation 330/2010 or case law from EU courts. A market player can thus rely on the Regulation 330/2010 if it is contradicted by the Vertical Guidelines and still claim the benefit of a safe harbor. The Vertical Guidelines have in many cases practical effects especially since national authorities tend to follow its contents accordingly. A law practitioner giving advice on vertical agreement matters therefore has to more or less pay attention to the view of the Commission.⁴⁸ The significant importance of the Vertical Guidelines can also be referred to the COJ when stating that an infringement shall not result in a fine so far as the conduct, constituting the infringement, depended on a nonbinding commission notice which misled the company to think it acted properly. By constructing the agreements in compliance with the Vertical Guidelines a company thereby ensures the avoidance of fines until case law from the COJ states something different.⁴⁹

⁴⁵ Wijckmans, p. 28.

⁴⁶ Goyder, p. 74.

⁴⁷ White Paper on modernization of the rules implementing articles 85 and 86 of the EC Treaty, Para 86.

⁴⁸ Wijckmans, p. 29-30.

⁴⁹ Cases 40 etc/73 Suiker Unie and Others v Commission [1975] ECR 1663, [1976] 1 CMLR 555.

2.4 Legislation on Vertical Distribution Agreements

2.4.1 Introduction

Before the distribution law concerning internet distribution is to be examined it is necessary to describe the basics of Art 101 in the TFEU⁵⁰. The intention is not to examine the article exhaustively but rather to give its essentials to enable for the following chapters to be understood in the right context. The EU competition law concerning vertical distribution agreements is structured in the way that Art 101(1) in the TFEU defines agreements that are incompatible with the internal market. Further, Art 101(2) in the TFEU states that agreements infringing Art 101(1) shall be automatically void and Art 101(3) in the TFEU declares that Art 101(1) may be inapplicable if some specified criteria are met. If an agreement is caught under Art 101(1) it is for the company to prove that its conduct should be justified under Art 101(3).⁵¹ The Regulation 330/2010 contributes with the block exemption meaning that even though an agreement on the face of it is caught under Art 101(1) it might benefit from the exemption in Art 101(3) in so far that it complies with its requirements according to Art 2 in the Regulation 330/2010. For the avoidance of doubt, Art 101 applies to both vertical and horizontal agreements while Regulation 330/2010 covers only vertical ones.

2.4.2 Article 101(1)

Art 101(1) in the TFEU reads as follows:

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development, or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

The prohibition in this article covers all agreement between undertakings, decisions by associations of undertakings and concerted practices in so far that they may affect trade be-

⁵⁰ The entire Art 101 is accessible in Appendix 1.

⁵¹ Karlsson, J., Fahlén, E., Nytt gruppundantag och nya riktlinjer för distributions- och andra vertikala avtal, Ny Juridik 4:10, Thomson Reuters, p. 34-39. Goyder, J., p. 22.

tween Member States that have as their object or effect the prevention, restriction or distortion of competition within the EU. The term ‘agreements’ has been interpreted widely and its scope covers both written agreements and for example gentlemen’s agreements.⁵² Systematic series of invoicing can also constitute an agreement even though the relevant local authority might not consider it as part of an individual contract.⁵³ Quite recently the COJ however set an upper limit for what constitutes an agreement in the Bayer case⁵⁴. The Commission imposed a EUR 3 million fine as a consequence of Bayer’s measures taken to hinder parallel exports which it considered as an agreement. Bayer had created a system that controlled parallel exports from wholesalers in low-cost countries to high-cost countries and limited the supplies for the guilty ones. The COJ took the view that the Commission had widened the scope of what constitutes an agreement too far and that the Commission had failed in proving that the system used by Bayer amounted to no more than a unilateral conduct. The conduct was in line with the approach taken by the COJ and constituted accordingly not an agreement under Art 101(1) TFEU.⁵⁵

The expression ‘decision by association’ covers all binding documents within the association. It is however extended to non-binding recommendations from an association only in so far that the members act in compliance with them.⁵⁶

Concerted practices have been held by the COJ to be when undertakings consciously cooperate practically for the rules of competition.⁵⁷ In another case the COJ also stated that the rules for concerted practices did not forbid undertakings to follow a certain behavior of competitors. The opinion of the COJ was rather that there is a concerted practice in case of direct or indirect contacts between the parties when the object or effects were to influence the conduct on the market of a competitor or disclose the course of their own conduct for adopting the market.⁵⁸

⁵² Case 41/69 ACF Chemiefarma [1970] ECR 661, [1970] CMLR 43. National Panasonic [1982] OJ L354/28, [1983] 1 CMLR 497, Para 43.

⁵³ Case 227/87 Sandoz v Commission [1990] I ECR 45, [1990] 4 CMLR 242. Goyder, p. 23.

⁵⁴ Cases C-2/01 and C—3/01 Bayer v Commission [2004] ECR I-23, [2004] 4 CMLR 653.

⁵⁵ Cases C-2/01 and C—3/01 Bayer v Commission [2004] ECR I-23, [2004] 4 CMLR 653. The Vertical Guidelines, Para 25 (a).

⁵⁶ Case T-325/01 Daimler Chrysler v Commission [2005] ECR II-3319, [2007] 4 CMLR 559, Para 210.

⁵⁷ Case 48/69 ICI v Commission [1072] ECR 619, [1972] CMLR 557, Para 64.

⁵⁸ Cases 40-48 etc/73 Suiker Unie v Commission [1975] ECR 1663, [1976] 1 CMLR 295, Para 174.

The next thing to determine is whether the agreement, decision or concerted practice may affect trade between Member States. The term ‘effect’ has been given a broad interpretation to include agreements that directly or indirectly, actually or potentially threaten the freedom of trade between Member States in so far that they might jeopardize the achievement of the single market.⁵⁹ The effect does also have to be appreciable,⁶⁰ estimated under quantity criteria which *inter alia* excludes small or medium-sized undertakings or undertakings with a market share up to 5 per cent.⁶¹

The final question to address is if there can be shown an object or effect that prevents, restricts or distorts the competition. The term ‘object’ can, but does not necessarily, include the intentions of the parties. For the evaluation of the object it is though necessary to determine it in both the legal and economic context.⁶² Anticompetitive effects need to be determined in the light of the agreement and the market context. The estimation of a restricting effect requires evaluation of economic and market circumstances for the relevant product including: the precise product market, market structure and market trends that therefore makes the issue hard to solve.⁶³ Regardless of the surroundings the agreement must still in itself have a significant effect and be evaluated in comparison with other similar networks.⁶⁴

2.4.3 Article 101(2)

Art 101(2) in the TFEU reads as follows:

Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

A contractual clause that is prohibited under Art 101(1) TFEU but is not covered by the exemptions in Art 101(3), as will be described below, is void under Article 101(2) TFEU. The nullity of an agreement is not limited to the contracting parties and it can therefore be invoked even by a third party. If the claim succeeds the infringing clause will be void with

⁵⁹ Cases 56 and 58/64 *Consten & Grundig v Commission* [1966] ECR 299, [1966] CMLR 418, p. 341.

⁶⁰ The Vertical Guidelines, Para 8-10 with reference to Case 5/69 *Volk v Vervaecke* [1969] ECR 295, [1969] CMLR 273 in note 4.

⁶¹ Goyder, p. 32.

⁶² Case C-501/06 etc *GlaxoSmithKline v Commission*, [2009] ECR I-9291, [2010] 4 CMLR 50.

⁶³ Goyder, p. 31.

⁶⁴ Case C-234/89 *Delimitis v Henninger Brau AG* [1991] ECR 1935, [1992] 5 CMLR 210, Para 27.

possible consequences both in past time and in the future.⁶⁵ The national courts have the competence to void agreements under Art 101(2) TFEU. Such voidance is though limited to the extent of those parts that infringe the rules in Art 101 TFEU,⁶⁶ subject to exemptions in national law.⁶⁷ Another question that depends on the national law is whether an agreement void under Art 101(2) is deemed only temporarily if the agreement is changed in conformity with the law. It is likely that i) the infringing part can make the agreement valid again by notice the counterparty that the infringing part of the agreement will not apply or does apply in a lawful manner and ii) some national courts may reconstruct the critical parts of the agreement to be in conformity with the law.⁶⁸

2.4.4 Article 101(3)

Art 101(3) in the TFEU reads as follows:

The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,
- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

If an arrangement infringes the Art 101(1) TFEU and is not exempted under the block exemptions in Regulation 330/2010 it can still be individually justified if the three cumulative requirements in Art 101(3) TFEU are fulfilled.⁶⁹ While the burden of proof initially is on the party claiming the infringement it is for the defending party to prove that the arrangement shall be exempted under Art 101(3) TFEU.⁷⁰ The question then arises, what has to be proven.

⁶⁵ Case 22/71 *Beguelin Import CO v GL Import-Export SA* [1971] ECR 949, [1972] CMLR 81, Para 29. Case c-279/06 *CEPSA v Tobar* [2008] ECR I-6681, [2008] 5 CMLR 1327, Para 74.

⁶⁶ Goyder, p. 33.

⁶⁷ Case 319/82 *Société de Vente de Ciments et Betons de l'Est SA v Kerpen & Kerpen GmbH & Co KG* [1983] ECR 4173, [1985] 1 CMLR 511, Para 12.

⁶⁸ Goyder, p. 34.

⁶⁹ Craig, P., *De Burca, G.*, p. 977.

⁷⁰ Goyder, p. 22. The burden of proof is on the party claiming the exemption and that party is normally the one accused for having infringed Art 101(1) at the first stage, see Art 2 in the Council Regulation (EC) 1/2003 on the implementation of rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1 (“Regulation 1/2003”) under “burden of proof”.

First of all, the impact on competition needs to result in an improvement of production or distribution, alternatively promote technical or economic progress. The distribution can be improved by cost reductions through rationalization, making it attractive for distributors to join the system or optimizing quality and delivery rates. The purpose with this criterion is to evaluate the restrictions of competition against the eventual objective advantages to determine whether the latter one compensates for the former.⁷¹

Secondly, if a certain contribution can be established, that advantage must benefit the consumers. The degree of benefit that is required depends on the restriction's effect on the internal market competition.⁷² It should also be mentioned that the Commission has considered consumer benefits as being not necessarily economic but that environmental results could also be seen as an advantage from which the consumers will receive a fair share.⁷³

The third condition sets up a so called proportionality test and states that the restrictive clause must be necessary for the attainment. If the same achievement could have been reached by less restricting means the clause would then not be considered as indispensable and the clause consequently not exempted.⁷⁴

2.4.5 Regulation 330/2010

2.4.5.1 General

A vertical agreement that infringes Art 101(1) in the TFEU can regardless of the possibility to justify it individually under Art 101(3) in the TFEU enjoy the safe harbor in Regulation 330/2010 if certain requirements are complied with. For an agreement to enjoy the safe harbor the following conditions need to be fulfilled as stated in Art 2 in the Regulation 330/2010. Firstly, the agreement must not be covered by another block exemption regulation. Secondly, none of the parties must hold a relevant market share exceeding 30%. Thirdly, the agreement must not confer intellectual property rights in so far that it constitutes the primary object of the agreement and are not directly connected to the use sale or resale of the relevant goods. Fourthly and finally, the agreement must not have been en-

⁷¹ Goyder, p. 35.

⁷² Goyder, p. 36. Compare with Commission Guidelines on the Application of Art. 81 (3) [2004] OJ C101/97, Para 85.

⁷³ CECED [2000] OJ L187/47, [2000] 5 CMLR 635, Para 56.

⁷⁴ Commission Guidelines on the Application of Art. 81 (3) [2004] OJ C101/97, Para 73.

tered between two competing undertakings (with exception to some non-reciprocal vertical agreements).⁷⁵

The rationale of the Regulation 330/2010 is constructed so that all vertical arrangements that are not expressly prohibited are exempted. This means that there is no exhaustive list on exempted clauses but on the other hand does Art 4 in the Regulation 330/2010 include clauses that are likely to restrict competition in a non-preferable way, the hardcore restrictions.⁷⁶

Critical for the assessment of the regulation is of course the scope of vertical agreement. In Art 1 (1) (a) in the Regulation 330/2010 it is defined as an agreement or concerted practice entered into between two or more undertakings each of which operates at a different level in the production chain and relates to the conditions under which the parties may purchase, sell or resell goods or services. The term includes even leasing and rental agreements but only to the part relating to the supplying of goods.⁷⁷

2.4.5.2 Relation to other block exemptions

As stated in Art 2 (5) in the Regulation 330/2010 it shall not apply to vertical agreements that falls within the scope of another block exemption regulation, if not otherwise stated in that regulation. Agreements normally excluded from the Regulation 330/2010 are e.g. those concerning transfer of technology⁷⁸, motor vehicles⁷⁹ and unilateral agreements^{80 81}.

2.4.5.3 Market share limit

The first block exemption containing a market share limit was the Regulation 2790/99 and as an example it has been followed by all later established regulations. Art 3 in the Regulation 330/2010 states that an exemption shall only apply on condition that the market share

⁷⁵ See Wijckmans, p. 88-90.

⁷⁶ Compare with Goyder p. 98-99.

⁷⁷ The Vertical Guidelines, Paras 25 (c)(d) and 26.

⁷⁸ Commission Regulation (EU) No 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements.

⁷⁹ Regulation 1400/2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector.

⁸⁰ Commission Regulation (EC) No 1218/2010 of 29 November 2010 on the application of Article 81(3) of the Treaty to categories of specialisation agreements.

⁸¹ For the relationship between Regulation 330/2010 and other regulations see the Vertical Guidelines, Para 46.

of the supplier does not exceed 30 per cent of the relevant market on which it sells the contract goods or services and the market share of the buyer does not exceed 30 per cent of the relevant market on which it purchases the contract goods or services. The new wording made an important contribution by expanding the market share limit to include the buyer as well as the supplier since it was also considered able to have significant power on the market. This approach is in line with the Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81 (1) of the Treaty establishing the European Community ('De Minimis Notice') (2001/C 368/07). The relevant market consists of both the product and the geographic market.⁸²

To define the relevant market one needs to consider the product market, i.e. products or services that are interchangeable or substitutable by the consumer, the products characteristics, prices and intended scope of use.⁸³ The Commission has to determine substitutability with a 'SSNIP-test'⁸⁴. Practically the test focuses on the affection of small (5-10 per cent) price increases and whether such a change makes customers buying from another reseller or another area. If so, the products will amount to the same product market and the areas compared will amount to the same geographic area.⁸⁵

The relevant geographical market is considered the area where the undertakings concerned are at least involved in the supply and demand of the product or services, where the circumstances regarding the competition are sufficiently uniform and can be distinguished from adjacent areas where the competition is appreciably different.⁸⁶ Regulation 330/2010 covers only agreements for distribution or resale and not selling to end-users. The relevant geographic market therefore has to be decided with regard to professional buyers which might widen its scope.⁸⁷

⁸² The Vertical Guidelines Para 88.

⁸³ Commission's Notice on the definition of the relevant market for the purposes of Community competition law [1997] OJ372/5, Para 7.

⁸⁴ SSNIP stands for Small but Significant Non-transitory Increase in Price and is expressed in Commission's Notice on the definition of the relevant market for the purposes of Community competition law [1997] OJ372/5, Para 14.

⁸⁵ Wijckman, p. 105-106.

⁸⁶ Commission's Notice on the definition of the relevant market for the purposes of Community competition law [1997] OJ372/5, Para 9.

⁸⁷ The Vertical Guidelines, Para 89.

2.4.5.4 Intellectual property rights

Art 2(3) in the Regulation 330/2010 states that intellectual property rights are covered only in so far that the provisions regarding intellectual property do not constitute the primary object of the agreement and that they are related to the use, sale or resale of the goods or services by the buyer to its customers. The intellectual property rights includes industrial property, rights, know-how, copyright and neighboring rights according to Art 1(1) (f) in the Regulation 330/2010. By stating that the rights are included, the article shall not be regarded as exhaustive and thus not prevent other rights to be enclosed as well.⁸⁸ The conditions set forth in Art 3(2) have been further developed by the Commission given the meaning that intellectual property rights can only be covered by the Regulation 330/2010 under the following circumstances. Firstly, the intellectual property rights must be part of a vertical agreement. Secondly, the intellectual property rights must be assigned to, or licensed for use by the buyer. Thirdly, the intellectual property rights must not constitute the primary object of the agreement; fourthly, the intellectual property rights must be directly related to the use, sale or resale of goods or services by the buyer or its customers. Finally the intellectual property rights in relation to the contract goods or services must not contain restrictions of competition having the same object as vertical restraints which are not exempted.⁸⁹ These conditions are of cumulative nature and thus need all of them to be fulfilled.

2.4.5.5 Agreements between competitors

The Regulation 330/2010 contains certain conditions on when it applies in regard of agreements between competitors and agreements between associations of undertakings. As starting point agreements between competitors are not exempted under the block exemption according to Art 2(4) in the Regulation 330/2010. ‘Competing undertaking’ is defined in Art 1(1) (c) in the Regulation 330/2010 as being actual or potential. ‘Actual’ means undertakings active on the same relevant market. ‘Potential’ means undertakings that, in the absence of a vertical agreement, would on realistic grounds and not mere as a theoretical possibility, in case of a small but permanent increase in relative prices be likely to undertake within a short period of time, the necessary additional investments or other necessary switching costs to enter the relevant market. Such a short period is suggested by the Com-

⁸⁸ Wijckman, p. 117, note 68 with reference to Mendelsohn, M., Rose, S., Guide to the EC Block Exemption for Vertical Restraints, Kluwer Law International, 2002, p. 47.

⁸⁹ The Vertical Guidelines, Para 31 a-e.

mission to be no more than one year.⁹⁰ It is also important to notice that when the undertaking is active on the same relevant market, it means both product and geographic market which can be distinguished from the older Regulation 2790/1999 where there was no requirement of geographic market at all.⁹¹ Art 2(4) in the Regulation 330/2010 states that when it can be established that there are two competing undertakings, the block exemption will only apply to non-reciprocal vertical agreements under to following circumstances. The supplier is a manufacturer and distributor of goods, while the buyer is a distributor and not competing at the manufacturing level or is a provider of services at several levels of trade, while the buyer provides its goods or services at retail level and does not compete at the retail level and is not competing at the level where it buys the service.

Agreements, concerted practices and decisions between associations of undertakings belong in the most to the cases to horizontal agreements. In the event however agreements are made between the association and its members or suppliers, it cannot be automatically excluded from being vertical and should be given the possibility to be covered by the block exemption.⁹² Art 2(2) in the Regulation 330/2010 therefore plays an important role for the consistency towards vertical agreements when stating that such agreements are covered if: all members of the association are retailers of goods and no individual member, together with connected undertakings has an annual turnover exceeding EUR 50 million.

2.4.5.6 Hardcore restrictions

In addition to the requirements presented above Art 4 in the Regulation 330/2010⁹³ contains hardcore restrictions that remove the benefit of the block exemption. The Commission states that if a vertical agreement contains a clause considered as a hardcore restriction the entire agreement will lose the possibility of benefiting from the safe harbor in the block exemption.⁹⁴ This can be compared to a non hardcore restriction which normally results in that only the infringing part of the agreement will be void.⁹⁵

⁹⁰ The Vertical Guidelines, Para 27.

⁹¹ Wijckman, p. 123.

⁹² Wijckman, p. 125.

⁹³ Art 4 in the Regulation 330/2010 is accessible in Appendix 2.

⁹⁴ The Vertical Agreement, Para 70.

⁹⁵ See chapter 2.4.6.

Art 4 in the Regulation 330/2010 states that the block exemption shall not apply to vertical agreements that directly or indirectly, in isolation or in combination with other factors under the control of the parties have as their object to achieve anything mentioned in Art 4 (a)-(e) Regulation 330/2010. In regard of internet distribution (b) and (c) are the most relevant ones. Art 4 (b) (i) in the Regulation 330/2010 contains a prohibition on restrictions of territory into which the buyer may sell its products or services with exception to, inter alia, restrictions of active sales into an exclusive territory or to an exclusive territory group reserved to the supplier or allocated by the supplier to another buyer. Art 4 (c) in the Regulation 330/2010 contains a prohibition on restrictions on active or passive sales to end users by members of a selective distribution system operating at the retail level of trade, with exception to the possibility to restrict members of the system from operating out of an unauthorized place of establishment. The COJ established in the Pierre Fabre case that internet distribution does not amount to an unauthorized place of establishment.⁹⁶

2.4.6 The enforcement and sanctions of Article 101 TFEU

After Council Regulation (EC) 1/2003 on the implementation of rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1 (“Regulation 1/2003”) Art 101 in the TFEU including the Regulation 330/2010 can be enforced by either public authorities or private market players. On the public basis the rules are enforced by the Commission together with the network of national competition authorities.⁹⁷ These public bodies can arrange investigations ex officio or based on complaints or suspicions.⁹⁸ Through the Regulation 1/2003 a prior system built on notification to the Commission which also had an exclusive right in the enforcement of Art 101(3) in the TFEU was abolished and opened up for private market players to enforce the EU competition law. The direct effect of Art 101(1) in the TFEU was recognized by the COJ already in case 127/73 BRT v SABAM [1974] ECR 51 in 1974.⁹⁹

⁹⁶ Pierre Fabre, Para 55-56.

⁹⁷ Commission Notice on co-operation within the Network of Competition Authorities [2004] OJ C101/43; Joint Statement of the Council and the Commission on the Functioning of the Network of Competition Authorities.

⁹⁸ Wijckmans, p. 21.

⁹⁹ Case 127/73 BRT v SABAM [1974] ECR 51 in 1974, Para 16.

If an infringement of Art 101 in the TFEU can be established either through public or private enforcement there are generally three potential sanctions. Firstly, an agreement infringing Art 101(1) is automatically void under Art 101(2) in the TFEU.¹⁰⁰ If the agreement is infringing only to some parts these will be void while the lawful rest will remain valid and can possibly be exempted under Regulation 330/2010.¹⁰¹ That will however not be the case if the parts of the agreement cannot be separated from each other or if the infringement regards hardcore restrictions since that takes away the benefit of the Regulation 330/2010 for the entire agreement.¹⁰² Secondly, an infringement can be sanctioned by fines imposed by the Commission. Such penalty fine is limited to 10 per cent of the annual worldwide turnover for the parties involved, according to Art 23 in the Regulation 1/2003. A large fine estimated to EUR 167.8 million was imposed on an agreement between Nintendo and its distributors restricting parallel trade.¹⁰³ The fine was appealed to the General Court which lowered the fine to EUR 119.2425 million,¹⁰⁴ but this clearly shows that EU competition law infringements can result in high costs. In regard to internet distribution the Commission fined Yamaha EUR 2.56 million for an agreement that inter alia contained a requirement for the distributors to contact Yamaha as supplier before completing any internet orders.¹⁰⁵ Thirdly, there is a possibility for third parties who are affected by the behavior infringing the EU competition law to claim indemnification for caused damages. The Commission expresses such a right for the damaged party in a White Paper issued in 2008.¹⁰⁶

¹⁰⁰ See chapter 2.4.3.

¹⁰¹ Compare to Case 56/65, *Société Technique Minière (L.T.M.) v. Maschinenbau Ulm GmbH* (1966) ECR 249.

¹⁰² Compare to the Vertical Guidelines, Para 70.

¹⁰³ *Nintendo Distribution*, OJ [2003] L 255/33.

¹⁰⁴ T-13/03 [2006] ECR II-975.

¹⁰⁵ *Yamaha*, Commission decision of 16 July 2003. The case was also mentioned in the Commission Press Release IP/03/1028, 16 July 2003.

¹⁰⁶ White Paper on Damages Actions for Breach of the EC antitrust rules, COM(2008) 165, 2.4.2008.

3 Distribution Agreements

3.1 Vertical and Horizontal Agreements

A vertical distribution agreement amounts to an agreement between two parties that operates at different levels in a distribution- or production chain according to Art 1.1 (a) in the Regulation 330/2010. A simple example could be a manufacturer contracting with a distributor or even a wholesaler. If instead the contracting parties operate at the same level they have a horizontal agreement.¹⁰⁷ Even though the major focus here is vertical agreements, the horizontal agreements can still be important to have in mind so far as they are used in combination. The both ways of contracting are covered by the same competition legislation although they might affect the trade differently.¹⁰⁸ This is the case when it comes to Art 101 in the TFEU but there are different regulations for vertical and horizontal agreements. Horizontal agreements tend to affect the competition in a non-preferable way since the purpose often is to control prices or divide the market and thus create cartels.¹⁰⁹ On the contrary the discussion on the effects on vertical agreements is more open which has made it difficult to find reasonable ways in how to regulate the area.¹¹⁰

3.2 Vertical Distribution Agreements

3.2.1 Non-exclusive Distribution Agreement Systems

Vertical distribution systems can be constructed in various ways. The starting-point is the non-exclusive distribution system where the supplier sells the goods to whoever wants to purchase from him or at least contracts on an individual basis with every distributor that commits to a deal. Since a non-exclusive distribution system per se means that there are no general restrictions or requirements on any other than the distributor, it might not affect competition to the same degree as the other types of systems described below. From the perspective of this thesis, this way of organizing the distribution is mainly important to enable a comparison with the selective and exclusive systems. It can be seen as the starting-point on which the other systems are modified towards their very nature.¹¹¹

¹⁰⁷ Bernitz, p. 134.

¹⁰⁸ Case 32/65 Italy v Commission. REG 1966 p. 389. The EU competition law is examined in chapter 2.

¹⁰⁹ Bernitz, p. 57. The Vertical Guidelines, Para 6 and 98-99.

¹¹⁰ Craig, P., De Burca, G., p. 951.

¹¹¹ Non-exclusive agreements are further described in relation to internet distribution in chapter 4.4.2.

3.2.2 Selective Agreement Systems

In a selective distribution system the supplier has constructed a system that allows him to sell the relevant goods or services only to those distributors that fulfill certain specified criteria. The distributors are themselves further limited to sell the relevant goods or services only to end-users or within the selective distribution system, i.e. to those who fulfill the criteria set out by the supplier.¹¹² Thus, the system limits the goods or services from being sold by unauthorized distributors. The supplier benefits by ensuring that all distributors will comply with the requirements set out, but the system can also encourage distributors to make e.g. investments and promotions of the relevant product knowing that there will be no intra-brand competition from outside the system.¹¹³ The supplier can also more easily require investments from the distributors through a criterion since every distributor knows that all other participating in the system will be obliged to contribute with the same efforts.

Assuming that a supplier wants distributors to purchase and introduce a new product, it would then be connected to a lower risk for the distributor to know that all potential sellers are required to make the same investments. By doing so, the system prevents the popping up of other stores providing the same products across the street and selling under other circumstances if the product launching succeeds. Consequently, selective distribution systems enable for the supplier to have general requirements for all distributors and on the other hand prevent distributors from so called free-riders.

The Commission has held that the limitation of authorized distributors might reduce the competition within the brand, the intra-brand competition.¹¹⁴ At the same time, selective distribution systems may also promote marketing efficiency and encourage distributors to focus on certain products which presumably increase competition between brands, the inter-brand competition.¹¹⁵

¹¹² Regulation 330/2010, Art 1.1 (e).

¹¹³ Bernitz, p. 142-143.

¹¹⁴ The Vertical Guidelines, Para 175.

¹¹⁵ Bernitz, p. 142-143. Selective distribution is further described in relation to internet distribution in chapter 4.4.4.

3.2.3 Exclusive Agreement Systems

Whereas selective distribution systems restrict in terms of the number or quality of authorized distributors through selection criteria, exclusive distribution agreements do it on territorial or less frequently on customer group basis. As the term reveals, exclusive distribution gives one distributor a sole right to sell a product actively within an appointed area or to a specifically targeted customer group. In this context it is here necessary to emphasize the importance of the distinction between active and passive sales. A restriction on passive sales is namely normally prohibited even within exclusive distribution systems.¹¹⁶

Exclusive agreement systems can be necessary when entering a new market, giving the supplier the opportunity to attract distributors willing to take risks connected to investments and perform after sale services in return for the exclusivity.¹¹⁷ It is not a secret that the use of exclusivity might affect competition; especially it can reduce the intra-brand competition and increase the risk of market partitioning. The exclusive agreement systems are however normally accepted within the EU in so far it is not combined with export restrictions or is otherwise inconsistent with the EU legislation.¹¹⁸

¹¹⁶ Bernitz, p. 145.

¹¹⁷ Bernitz, p. 144.

¹¹⁸ See Wijckmans, p. 200. Exclusive distribution is further described in relation to internet distribution in chapter 4.4.3.

4 Internet Distribution

4.1 The internet market within the EU

During the last two decades internet has grown and become a large and powerful tool with a possibility for companies to reach customers in a way that has never been experienced before.¹¹⁹ With that in mind it is not surprising that the development of internet has caused an intense debate on how to treat it in an EU competition law context. The Commission has presented primarily two consumer benefits arising from internet distribution. Firstly, that it can result in lower prices and secondly, that it might widen the range of products to choose from for the consumer. From a commercial perspective companies can access new markets, beneficiary for those of the companies that develop their competitiveness.¹²⁰

Even though the EU endeavors toward a single market without internal frontiers, obstacles still remain. The Commission has in a staff working document analyzed the online trade within the EU market and found that the fragmented market can be referred to *inter alia* after-sales services, complicated transportations, application of guarantees for refunds and of course the regulatory differences in national legislation for consumer protection.¹²¹ Consumer suspiciousness might also arise from the increased risks connected to online trade such as spread of personal data, counterfeit products and unfair consumer practices.¹²² Notwithstanding the lack of a maximized development of the online market it is beyond doubt that it withdraws considerable consumer benefits. The Commission demonstrated for example in an EU-wide study that it was possible to find a 10 per cent cheaper product through online sales in another Member State for at least half of the searched products in 13 of the 27 Member States.¹²³ The Commission has set out an apparently strong approach in encouraging internet distribution and the COJ has at least partly confirmed that direc-

¹¹⁹ The Vertical Guidelines, Para 52.

¹²⁰ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the regions on Cross-Border Business to Consumer e-Commerce in the EU, Brussels, 5.3.2009, Para 1.

¹²¹ Commission Staff Working Document Report on cross-border e-commerce in the EU, February 2009, p. 12.

¹²² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the regions on Cross-Border Business to Consumer e-Commerce in the EU, Brussels, 5.3.2009, Para 3.

¹²³ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the regions on Cross-Border Business to Consumer e-Commerce in the EU, Brussels, 5.3.2009, Para 9.

tion.¹²⁴ Before the rules are presented more deeply potential effects of internet distribution will be presented followed by the earlier legislation.

4.2 Potential effects of internet distribution

In order to enable an evaluation and a deeper understanding of the rules concerning internet distribution it is essential to describe some of the potential positive and negative effects. As already touched upon, internet as a distribution channel can heavily widen the range of potential consumers without regard to national borders. This fact does also affect the product availability for consumers and the low costs for searching and finding them.¹²⁵ The possibility for companies to reach larger markets also tends to increase the competition since more companies will compete about the same customers. This high density of competitors will then hopefully accelerate the development of both lower costs and higher quality.

On the other hand, internet distribution might also cause challenges and difficulties for both companies and customers. One important issue is the so called free-riding, where e.g. some companies make contributions and investments in order to promote and commercialize a product after which other companies sell the same product and benefit from the first companies efforts.¹²⁶ The new benefiting companies can sell at lower prices since they do not have to bear the same investment costs which make the initial companies willing to control such market behaviors.¹²⁷

In an internet context free-riding can appear in many ways. Consumers can see a product and try it in a brick and mortar shop and later buy it at lower price from an internet distributor who then becomes the free-rider. The same can occur between two internet distributors where the customer accesses reviews and information at one company's page and then buy it from another one.¹²⁸ Even though it is obvious that free-riding can occur in different ways it is arguable that internet distributors are more likely to free-ride than those operating through brick and mortar shops. This view has at least partly been supported by the Com-

¹²⁴ See the Pierre Fabre case as will be examined in more detail in chapter 4.5.2.5 and 4.5.3.

¹²⁵ Chevalier, J.A., Free Rider Issues and Internet Retailing, p. 1.

¹²⁶ Wijckmans, F., Tuytschaever, F., Vanderelst, A., Vertical agreements in EC Competition Law, Oxford University Press, Oxford, 2006, p. 285.

¹²⁷ Chevalier, J.A., Free Rider Issues and Internet Retailing, p. 1.

¹²⁸ Chevalier, J.A., Free Rider Issues and Internet Retailing, p. 2-3.

mission who has accepted some restrictions on competition e.g. when a distributor has entered into a new market and made significant investments.¹²⁹ In a press release the Commission also manifested that it was eager to uphold the balance between the consumer interest and the companies need to control the distribution.¹³⁰

Since internet as distribution channel opens up to sell over the whole globe it puts the supplier in a far more difficult position when it comes to combat counterfeit, i.e. to prevent sales of products that are not original under a certain brand.¹³¹ Difficulties might arise since the geographic market to control expands and internet distribution does not allow consumers to physically control the product before it receives it. The lack of control of distribution systems as internet distribution might lead to can also, albeit under unusual circumstances, cause damage to the brand and image itself, e.g. when it comes to luxury and exclusive products.¹³²

As one can see the internet distribution plays an important role in the market integration but does also address new challenges for market players to deal with. The following chapters aim to describe how this part of a distribution system is treated legally within the EU.

4.3 Prior legislation and debate

4.3.1 Internet distribution under Regulation 2790/99

The today's legislation on internet distribution has evolved from the earlier Regulation 2790/1999 which expired as late as 2010. The older regulation was in its wording quite similar to the new one and online promotion and sales were solely mentioned in the accompanying 2000 Vertical Guidelines. The Commission did not describe the treatment of internet distribution deeply in the 2000 Vertical Guidelines but set at least out four essential principles.¹³³ Internet distribution was principally treated as a form of passive sales.¹³⁴ Art 4 (c) in the Regulation 2790/1999 did, as the new Regulation 330/2010, also exclude restrictions on passive sales within selective distribution systems from its application with the conse-

¹²⁹ See for example the Vertical Guidelines, Para 61. Compare to Wijckmans, p. 229.

¹³⁰ Commission Press Release IP/09/1197, 27 July 2009.

¹³¹ Online Commerce Roundtable Report on Opportunities and barriers to online retailing, Para 78.

¹³² Advocate General Mazak, Para 54. Compare with C-59/08 (REG 2009, s. I-3421), Para 37.

¹³³ Wijckmans, p. 228.

¹³⁴ 2000 Vertical Guidelines, Para 50.

quence that all distributors generally must be unrestricted to use internet for advertise and sales purposes. The 2000 Vertical Guidelines did however open up for an exemption to the general rule and did thus treat internet distribution and promotion as active sale when primarily approaching a specific customer group or a certain geographic location which forms part of another distributor's exclusive territory. The Commission did also make clear the possibility for suppliers to set quality standards or requirements, including but not limited to selective distribution systems, but that an outright ban on internet distribution could only be lawful if objectively justified.¹³⁵

4.3.2 The progress into the Regulation 330/2010

The fact that consumers benefit from internet distribution are beyond doubt as described above,¹³⁶ and the competition rules had already made a significant contribution by prohibiting anti-competitive restrictions within that field.¹³⁷ With this in mind the Commission started in 2008 the progress which should two year later result in the Regulation 330/2010 and the Vertical Guidelines. It is not surprising that the treatment of internet distribution was one of the major issues following the market trends.¹³⁸ The review aimed to clarify and simplify the rules and by that limit obstacles that otherwise would prevent the internet efficiencies to reach the consumers.¹³⁹

When reviewing the distribution law the Commission initially consulted major consumer and industry representatives in the 'Online Commerce Roundtable Report on Opportunities and barriers to online retailing'.¹⁴⁰ In summary the participants represented generally two opinions. Suppliers of technically advanced and luxury products, such as Moët Hennessy Louis Vuitton, argued that the criteria within a selective distribution system should be equal both towards online distributors as to distributors selling through brick and mortar shops in order to preserve the brand image. It continued by stating that 'cheap' internet

¹³⁵ 2000 Vertical Guidelines, Para 51.

¹³⁶ See chapter 4.2.

¹³⁷ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the regions on Cross-Border Business to Consumer e-Commerce in the EU, Brussels, 5.3.2009, Para 41.

¹³⁸ Wijckmans, p. 18.

¹³⁹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the regions on Cross-Border Business to Consumer e-Commerce in the EU, Brussels, 5.3.2009, Para 41.

¹⁴⁰ Online Commerce Roundtable Report on Opportunities and barriers to online retailing, Para 1.

distribution can result in low price for a while but undermine the brand in the long term.¹⁴¹ The counterparties in the debate were the pro-internet representatives, among them eBay, arguing for a treatment of all restrictions on internet distribution as hardcore restrictions which would leave the supplier with one way out, to plead for an individual exemption under Art 101(3) in the TFEU.¹⁴²

The Commission followed up the Roundtable Table Report and Issues Paper and came out with a public consultation and released a draft of the new block exemption regulation¹⁴³ and vertical guidelines¹⁴⁴ after which it received approximately 150 submissions.¹⁴⁵ Moët Hennessy Louis Vuitton kept its view and argued accordingly for the consumer benefits arising from selective distribution systems that limit internet distribution in terms of service, experience, choice and protection.¹⁴⁶ Moët Hennessy Louis Vuitton continued to build up scenarios where internet distributors outmaneuver the brick and mortar shop distributors with the following result that there would be no more possibility for consumers to physically view the products.¹⁴⁷ On the opposite side eBay took the view that distributors normally are the weaker part in a distribution chain. The starting point should thus be for the supplier to argue for an individual exemption under Art 101(3) TFEU.¹⁴⁸ eBay did also criticize the new possibility for suppliers to, under certain circumstances, require distributors in a selective distribution system to have at least one brick and mortar shop. This possibility was not considered as necessarily withdrawing quality benefits.¹⁴⁹

¹⁴¹ Online Commerce Roundtable Report on Opportunities and barriers to online retailing, Para 77.

¹⁴² eBay, Contribution Opportunities in online goods and services: Public Consultation on the Issues Paper, p. 4.

¹⁴³ Draft Commission Regulation (EC) on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, Brussels, C(2009) 5365/3.

¹⁴⁴ Draft Commission Notice Guidelines on Vertical Restraints, Brussels, SEC(2009) 946/3.

¹⁴⁵ Wijckmans, p. 18. The contributions can be accessed at:
http://ec.europa.eu/competition/consultations/2009_vertical_agreements/index.html 2012-05-08

¹⁴⁶ Moët Hennessy Louis Vuitton, Submission concerning the review of the Community competition rules applicable to vertical restraint, Para 2.

¹⁴⁷ Moët Hennessy Louis Vuitton, Submission concerning the review of the Community competition rules applicable to vertical restraint, Para 11.

¹⁴⁸ eBay, Response to the Public Consultation on the European Commission's Review of the Vertical Restraints Regulation and Guidelines, p. 15.

¹⁴⁹ eBay, Response to the Public Consultation on the European Commission's Review of the Vertical Restraints Regulation and Guidelines, Para 1.

Although the final result in Regulation 330/2010 could be rather seen as an upgrade than new legislation,¹⁵⁰ the Vertical Guidelines contain a more detailed description on the separation of active and passive sales in exclusive distribution and what criteria are lawful when appointing distributors within a selective distribution system.¹⁵¹ Whether any view was more favored than the other by the Commission remains to be ascertained.

4.4 Internet distribution under Regulation 330/2010

4.4.1 General

The current legislation on internet distribution can be seen from different views and this chapter aims to describe how the area is structured and what are the rules and principle applicable to it. The starting point is the Regulation 330/2010 but it might seem quite obvious at this stage that the Vertical Guidelines must be consulted as well. The Vertical Guidelines are of significant importance since internet distribution is only directly mentioned therein. As described in chapter 2.3.3 the Vertical Guidelines constitute soft law and are thus strictly binding only to the Commission, but the national competition authorities nevertheless often treat it as black-letter law.¹⁵²

The Vertical Guidelines clearly express that every distributor in a selective distribution system shall be free to use internet for the purpose of actively or passively selling products,¹⁵³ which upholds the rule set out in Art 4 (c) in the Regulation 330/2010. This is however the starting point and there are exceptions to this rule as will be explained further on. All restrictions on internet distribution presented below as potentially lawful must be justified by the characteristics of the relevant product.¹⁵⁴

Within exclusive distribution systems the supplier can however restrict active sales and advertisements into another distributor's exclusive territory, as stated in Art 4 (b) (i) in the Regulation 330/2010. To establish whether restrictions on internet distribution are lawful or not it is therefore necessary to determine how the actual restriction relates to the catego-

¹⁵⁰ Wijckmans, p. 18.

¹⁵¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the regions on Cross-Border Business to Consumer e-Commerce in the EU, Brussels, 5.3.2009, Para 42-43.

¹⁵² Wijckmans, p. 27-28. Black-letter law is a principle of law so notorious and entrenched that it is commonly known and rarely disputed.

¹⁵³ The Vertical Guidelines, Para 56.

¹⁵⁴ The Vertical Guidelines, Para 176.

rization of active and passive sales since the restrictions on these two sale methods constitute in certain circumstances hardcore restrictions.¹⁵⁵ It also needs to be emphasized that the possibility to exempt an agreement on internet distribution must in addition to the rules presented here also comply with the general requirements in Regulation 330/2010 as presented above in chapter 2.4.5.

The Commission considers an internet webpage as a form of distribution rather than a new outlet.¹⁵⁶ This view was also supported by the COJ in the Pierre Fabre case where the use of internet could not be seen as distribution operated from an unauthorized place of establishment according to Art 4 (c) in the Regulation 330/2010.¹⁵⁷ This means that a supplier cannot restrict internet distribution on the sole ground that it is considered as an unauthorized place of establishment and this rule seems to stand regardless if it is in the context of non-exclusive, exclusive or selective distribution.¹⁵⁸

Art 4 in the Regulation 330/2010 prevents only vertical agreements that have as their object to infringe the rules therein. The next step in the assessment of the rules is therefore to determine when restrictions on internet distribution constitute such an object. If an agreement is considered to fall within the scope of Art 4 in the Regulation 330/2010 it will not enjoy the safe harbor and thus not be exempted from infringing Art 101(1) in the TFEU. The only way for the company is then to justify the agreement under the individual exemption in Art 101(3) in the TFEU. That requires however the company to first show the consumer benefits before the party claiming the infringement must show the negative effects on the competition. Since the burden of proof is inversed in Art 101(3) TFEU it puts the infringing company in a far more difficult position. In addition to the burden of proof, an infringement of Art 4 in the Regulation 330/2010 results in that the entire agreement loses the benefit of the block exemption.¹⁵⁹

The last and very central issue for the thesis is the question regarding the presumption rules on potential infringements on internet distribution under the rules of hardcore restrictions in Art 4 in the Regulation 330/2010. The Commission has stated that there is a double

¹⁵⁵ See chapter 2.4.5.6 as regards the application of Art 4 in the Regulation 330/2010.

¹⁵⁶ Vertical Guidelines, Para 57. Compare with Wijckmans, p. 227.

¹⁵⁷ Pierre Fabre, Para 58.

¹⁵⁸ Wijckmans, p. 227.

¹⁵⁹ The Vertical Guidelines, Para 70. See also Wijckmans, p. 126.

negative presumption meaning that an agreement that contains a hardcore restriction is firstly presumed to infringe Art 101(1) in the TFEU by not being exempted under the Regulation 330/2010 and secondly presumed that it is likely that it will not be individually exempted under Art 101(3) in the TFEU. This question among others was dealt with by the COJ in the Pierre Fabre case which will be presented further on.¹⁶⁰

4.4.2 All distribution formulas

According to the Commission some restrictions can be imposed on internet distribution regardless if the agreement amounts to a non-exclusive, exclusive or selective distribution system.¹⁶¹ A supplier can require distributors to have at least one physical point of sale, i.e. a brick and mortar shop, the so called brick and click concept.¹⁶² This does not mean that a certain proportion can be required to be sold through one of the distribution forms but only that a minimum amount or volume is sold offline. Such a requirement must though be the same for all distributors based on objective criteria in regard of inter alia geographic location or size of the distributor.¹⁶³ This requirement has been considered as a possibility to limit the performing of distribution to only pure players and any company providing products solely over the internet is thus excluded.¹⁶⁴ The wording of this provision was written only in a footnote in the draft to the Vertical Guidelines, but was later taken into the main body.¹⁶⁵ The Commission thereby emphasized the importance for such a possibility for the supplier. It can however be questioned if this requirement can be effectively used by a supplier where there is necessary to have a brick and mortar shop. As already stated, a supplier can only require a certain quantity to be sold offline which is reasonable in relation to the distributor's size in the network and geographic location. This means that there might be a possibility for a distributor to locate its brick and mortar shop in a none attractive region in a low cost country and claim to only be required to sell a modest quantity offline but in-

¹⁶⁰ The presumption rules are described and presented in chapter 4.6.

¹⁶¹ The requirements imposed must however be necessary for the characteristics of the product, according to the Vertical Guidelines, Para 172.

¹⁶² The Vertical Guidelines, Para 54. A brick and mortar shop requirement was accepted by the French competition authority in Conseil de la Concurrence, Decision 06-D-24 of 24 July 2006.

¹⁶³ The Vertical Guidelines, Para 52 c.

¹⁶⁴ Wijckmans, p. 229.

¹⁶⁵ Draft Commission Notice, Guidelines on Vertical Restraints, Brussels, SEC(2009) 946/3, Para 52, footnote 29. The former wording was criticized in Baker & McKenzie's Vertical Restraints – Response to consultation, p. 6.

stead focus on export to high cost countries. From that scenario it is possible that the brick and click concept lacks efficiency in so far that it aims to prevent free riders.¹⁶⁶ It is not clear how this risk for abuse would be judged but as the Vertical Guidelines stand today they do not seem to prevent such behavior.

The supplier can also support the distributors' offline or online efforts with a fixed fee in so far that the supplier does not impose higher prices for products planned to be sold online.¹⁶⁷ In regard of websites the distributor can be required to enable for visiting customers to access other websites through links. The supplier can by doing so ensure that customers will be able to read information or purchase products in a certain language.¹⁶⁸ The website can also be required to meet certain quality standards as can be required on sales through brick and mortar shops. Such requirements can be extended to cover even websites hosted by a third party, e.g. that customers shall not access the distributor's website by going through another website with the third party's name or logo on.¹⁶⁹

4.4.3 Exclusive distribution - Active and passive sales

One of the important issues aimed to be clarified in the Vertical Guidelines was the distinction of active and passive sales and how these are related to the internet distribution. Regarding selective distribution systems the distinction between active and passive sales has no effect since none of them can lawfully be restricted as to the object of an agreement according to Art 4 (c) in the Regulation 330/2010. Instead this matter refers to Art 4 (b) (i) in the Regulation 330/2010 which states the possibility to restrict active sales into other distributors' exclusive territory or to an exclusive customer group. In an internet distribution context this means that a supplier is free to limit all sales and promotion in so far as the relevant item can be regarded as active. So the question that needs to be answered is: when does internet distribution constitute active sales or advertisement?

In general internet distribution is considered passive sales if e.g. a consumer visits a website, contacts the distributor and this finally leads to a sale. This is also the case when a consumer unilaterally chooses to be automatically updated by the distributor and ends up in

¹⁶⁶ Compare to the arguing in Linklaters LLP in submission in response to the European Commission's consultation process regarding the competition rules on vertical agreements, p. 20-21.

¹⁶⁷ The Vertical Guidelines, Para 52 d.

¹⁶⁸ The Vertical Guidelines, Para 52 a.

¹⁶⁹ The Vertical Guidelines, Para 54.

sale.¹⁷⁰ The offering of different languages does not constitute active sales per se and the Commission has in the new Vertical Guidelines taken a more relaxed approach than before.¹⁷¹ Notwithstanding that it is still possible that the language can have an effect on the overall judgment when e.g. an exclusive distributor in state A offers the information in language of state B and shows the price in the currency of state B.¹⁷²

A supplier in an exclusive distribution system can also restrict distributors from sending unsolicited information to specifically targeted customers within others' exclusive territories. A restriction is also lawful if made in order to prevent distributors from purchasing search engine services in regard of advertisement in other exclusive territories.¹⁷³ The Commission has however considered some restraint as hardly justifiable even within exclusive distribution systems such as: re-routing of customers visiting a certain website or to stop a purchase if the payment system discovers a credit card registered outside the exclusive territory.¹⁷⁴ The same difficulties will occur for a supplier who requires a higher payment for products that are to be sold online, so called dual pricing. Such a condition can be individually justified according to Art 101(3) in the TFEU e.g. if internet distribution leads to significantly higher costs. The restriction will however still not enjoy the block exemption under Regulation 330/2010.¹⁷⁵

4.4.4 Selective distribution

For selective distribution the Regulation 330/2010 has taken a particularly far-reaching approach in preventing restrictions on both active and passive sales. Fundamentally this means that no sales can normally be generally restricted at all but the Commission has however stated some possibilities to control and assure quality. Selective distribution is built upon a system with authorized distributors, i.e. those who fulfill the criteria set out by the supplier. On the face of it the nature of selective distribution systems can be questioned on its ability to co-exist with the principle that every distributor in such a system shall be

¹⁷⁰ The Vertical Guidelines, Para 52.

¹⁷¹ 2000 Vertical Guidelines, Para 51, stated that offering different languages normally plays no role compared to Vertical Guidelines, Para 52, which states that offering different languages does not in itself change the passive nature.

¹⁷² Compare with Wijckmans, p. 231.

¹⁷³ The Vertical Guidelines, Para 53.

¹⁷⁴ The Vertical Guidelines, Para 52(a) and (b).

¹⁷⁵ The Vertical Guidelines, Para 64.

free to sell both actively and passively.¹⁷⁶ The Commission has solved these two contradicting principles by stating that the same criteria shall apply to both internet distribution and sales through a brick and mortar shop. The criteria do not have to be equivalent for the two kinds of distribution but as the Commission puts it “[...] *should pursue the same objectives and achieve comparable results* [...]”¹⁷⁷. This possibility of differentiating the requirements is justified by their special nature.¹⁷⁸

A supplier who selectively appoints distributors may require them to comply with a maximum quantity to be sold to one single end user. This may be justified in order to prevent sales to unauthorized dealers that could more easily get hold of the relevant products on the internet than else.¹⁷⁹ Distributors can also be required to comply with certain delivery commitments, e.g. to deliver a product within a certain time from the order made to it to hinder the distributor from selling products that are not stocked.¹⁸⁰ Requirements on an online after-sales help desk may also be imposed on distributors.¹⁸¹ These can of course vary because of the different product markets and size of geographic sales markets. Such a clause could tentatively be combined with a fixed fee as described in chapter 4.4.2 with the result that online distributors will pay an extra fee in order to cover the costs that occurs in relation to the return of products. This could be useful if a customer chooses to purchase a product from a distributor far away on the internet but then returns the product to another distributor’s brick and mortar shop and that distributor then will further the costs back to the supplier.

4.5 Objectively necessary justifications

4.5.1 Restriction by object

Art 4 Para 1 in the Regulation 330/2010 states that for an agreement to be considered as a hardcore restriction it requires that agreement must to be directly or indirectly restricting to its object. This can be compared with the wording in Art 101 (1) in the TFEU which co-

¹⁷⁶ These two principles are mentioned in the Vertical Guidelines, Para 56.

¹⁷⁷ The Vertical Guidelines, Para 56.

¹⁷⁸ The Vertical Guidelines, Para 56.

¹⁷⁹ The Vertical Guidelines, Para 56.

¹⁸⁰ Wijckmans, p. 230.

¹⁸¹ The Vertical Agreements, Para 56.

vers agreements that contain restrictions to its object or effects. The questions then are what do constitute a restriction by its object and are there any justifying grounds?

The COJ has held in the case *GlaxoSmithKline v Commission* that the object shall generally be determined with regard to the relevant contents of the clause, the purpose it aims to achieve and the legal and economic context.¹⁸² A discussion regarding an agreement potentially having as its object to restrict competition was held in the recently given preliminary ruling from COJ in the *Pierre Fabre* case which concerned restrictions on internet distribution. In that case the COJ held that, under the current circumstances, a selective distribution agreement containing a clause which practically prohibits internet as distribution channel has to its object to restrict internet distribution. Such an agreement constitutes an infringement of Art 101 (1) in the TFEU unless it can be individually exempted under Art 101 (3) in the TFEU.¹⁸³ The Advocate General concluded that there cannot be any abstract formula on how to define an unlawful object.¹⁸⁴ Both the COJ and the Advocate General confirmed that all distributors must generally be free to use internet for selling goods as stated by the Commission, although they did not expressly make reference to it.¹⁸⁵

The COJ referred to the case *GlaxoSmithKline v Commission* where it held that there is no need to establish deprivation among the customers for there to be a restriction to its object.¹⁸⁶ Neither must there be an intention to restrict competition even though it could be an aspect to take into account in the general assessment.¹⁸⁷ In the *Pierre Fabre* case the judgment concerned a selective distribution system which had already been held to inevitably affect competition. With reference to *AEG-Telefunken v Commission*, the COJ stated that selective distribution agreements are considered as restricting competition to its object unless objectively justified.¹⁸⁸

¹⁸² Case C-501/06 etc *GlaxoSmithKline v Commission*, [2009] ECR I-9291, [2010] 4 CMLR 50, Para 58.

¹⁸³ *Pierre Fabre*, Para 59. The case is examined in more detail in chapter 4.5.2.5. See also Case C-209/07, *Beef Industry Development Society and Barry Brothers*, REG 2008, s. I-0000, Para 21 and 23.

¹⁸⁴ Opinion Advocate General Mazak in Case C-439/09, *Pierre Fabre Dermo-Cosmétique*, Para 26.

¹⁸⁵ Compare to the Vertical Guidelines, Para 52.

¹⁸⁶ Case C-501/06 etc *GlaxoSmithKline v Commission*, [2009] ECR I-9291, [2010] 4 CMLR 50, Para 63.

¹⁸⁷ Ezrachi, A., *EU Competition Law – An Analytical Guide to the Leading Cases*, Second Edition, Hart Publishing, Oxford 2010, p. 83-84. Case 110/82 *IAZ International Belgium and Others v Commission* [1983] ECR 3369, Para 58.

¹⁸⁸ *Pierre Fabre*, Para 39, with reference to the Case 107/82 *AEG-Telefunken v Commission* [1983] ECR 3151, Para 33.

4.5.2 Justifications

4.5.2.1 Introduction

The general position taken by the Commission is that every distributor must be allowed to use internet for sales and advertisement,¹⁸⁹ and the prevention of restrictions by its object is in line with that rule. As already stated above, the Commission has however opened up for some specific restrictions that may be exempted from that rule.¹⁹⁰ In addition there are some more general potential exemptions expressed by the COJ, the Commission and in the literature. For a selective distribution system to be objectively motivated there must be an objective appointment of distributors of quality nature performed in a uniform manner towards all potential distributors without being discriminatory. It is also important that the imposed requirements are appropriate to the nature of the product and that there is a need for a certain distribution system to ensure the quality and a proper use of it. Finally the requirements must not go beyond what is necessary to achieve the aim.¹⁹¹

4.5.2.2 Restrictions due to public bans – health and safety

The Commission has stated that hardcore restrictions, such as restrictions on internet distribution as part of passive sales, may be objectively necessary in exceptional cases where the agreement is of a specific nature.¹⁹² One example of a justification is when a restriction aims for the agreement to not conflict with a public ban on sales of dangerous substances for health and safety reasons.¹⁹³ The statement is not focused to internet distribution but covers all hardcore restrictions, even though the wording in the draft only mentioned internet sales.¹⁹⁴ The example given is not remarkably far-reaching since it only enables for suppliers to construct their distribution agreements in line with a public ban, i.e. an agreement restricting internet distribution is justified in so far that the agreement, in the absence of such restriction, would infringe the ban. According to the Commission a public ban cannot go beyond what is regulated by the competent national or EU authority, otherwise

¹⁸⁹ The Vertical Guidelines, Para 52.

¹⁹⁰ E.g. require at least one brick and mortar shop, a certain minimum amount to be sold offline etc. See chapter 4.4.2, 4.4.3 and 4.4.4.

¹⁹¹ Pierre Fabre, Para 39, with reference to the Case 26/76 Metro SB-Großmärkte v Commission [1977] ECR 1875, Para 20 and the Case 31/80 L'Oréal v De Nieuwe AMCK [1980] ECR 3775, Para 15 and 16. See also Wijckmans, F., Tuytschaever, F., Vanderelst, A., Vertical agreements in EC Competition Law, Oxford University Press, Oxford, 2006, p. 274.

¹⁹² The Commission expressed this in Advocate General Mazak, Para 33.

¹⁹³ The Vertical Guidelines, Para 60.

¹⁹⁴ Draft Commission Notice, Guidelines on Vertical Restraints, Brussels, SEC(2009) 946/3, Para 54.

the companies would have replaced the function of the authorities.¹⁹⁵ Advocate General Mazak did not fully agree with the Commission. He held that even in the absence of national or EU legislation there can be exceptional cases where it is necessary to restrict internet distribution in so far that the restrictions are appropriate for the achievement of the legitimate aim which must be of public character and proportionate. In this context the legitimate aim must go beyond the protection of the product image or a company's desirable means of marketing and distributing.¹⁹⁶

Another interesting aspect is that the example given by the Commission mentions restrictions for the purpose of health and safety.¹⁹⁷ The Commission does not give any further explanation on what may amount to health or safety reasons important enough to justify an exemption for the agreement. An example is however made in the doctrine which states that the supplier of chainsaws may possibly require that the customer must personally receive information on how to use the machine at the time of delivery of the product. The object of the requirement is not to directly restrict internet distribution since it applies to both online and offline sales. There could be an indirect object if the supplier was unable to show that the restriction was intended to attain a lawful aim, e.g. to ensure correct pre-delivery information on the use of the machine.¹⁹⁸ This example can be clearly traced back to the Commission's example concerning health and safety issues. Even though health and safety were not mentioned as exhaustive examples they must however be of significant importance since the Commission did clearly distinguish these two from other factors in a prior decision against Yamaha. In that decision the agreements required the distributors to consult Yamaha before they exported any products over the internet and the Commission could not see that any reasons presented could justify the imposed obligations. The agreements concerned distribution of music instruments and the exportation of such products could not invoke any justification for security or safety purpose.¹⁹⁹ The Commission did also give its opinion and enabled for the possibility to restrict competition in order to safeguard the health of the consumer in the case *Kathon Biocide*. It did however also state that

¹⁹⁵ Advocate General Mazak, Para 33.

¹⁹⁶ Advocate General Mazak, Para 35.

¹⁹⁷ The Vertical Guidelines, Para 60.

¹⁹⁸ Wijckmans, p. 235. Compare with the Vertical Guidelines, Para 54.

¹⁹⁹ Yamaha, Commission decision of 16 July 2003.

such restrictions are to be scrutinized narrowly and will only be accepted if proportionate.²⁰⁰

4.5.2.3 Restrictions due to technically advanced and high quality products

In the Pierre Fabre case COJ declared that selective distribution agreements restrict competition unless they are objectively motivated.²⁰¹ With reference to the case AEG-Telefunken v Commission law the COJ stated that the upholding of a network of specialized stores providing service for technically advanced high quality products can justify restrictions that affect prices in so far the competition relates to other than the prices, e.g. the degree of service or advice given to the customer.²⁰² Since internet often affects the competition and widens the market on which distributors can sell their goods this means that the restriction of such distribution might lead to less price competition.²⁰³ Therefore a restriction on internet distribution on these grounds can probably only be justified if competition is related to other than the price. Technical restrictions are held to be justified if they are applied objectively to all distributors in a non-discriminatory manner.²⁰⁴ A practical example is a decision from the French Competition Authority where a justification was accepted in regard of high-end hi-fi products where a pre-delivery listening test was required to be made at a brick and mortar shop.²⁰⁵ In an older case the Commission accepted a restriction that amounted to the maintenance of quality control.²⁰⁶

4.5.2.4 Restrictions due to penetration of new markets and testing of new products

The Commission sets out two additional ways of restricting distribution, although subject to very limited situations. Firstly, restrictions on both active and passive sales might be law-

²⁰⁰ Roth, Peter, Rose, Vivien, Bellamy, Christopher W. & Child, Graham D. (red.), European community law of competition, 6 edition, Oxford University Press, Oxford, 2008, p. 175 with reference to Kathon Biocide OJ 1984 C 59/6 [1984] 1 CMLR 476.

²⁰¹ Pierre Fabre, Para 39.

²⁰² Pierre Fabre, Para 39, with reference to the Case 107/82 AEG-Telefunken v Commission [1983] ECR 3151, Para 33.

²⁰³ Compare to White & Case L L P comments on the draft commission regulation on the application of article 81(3) of the treaty to categories of vertical agreements and concerted practices and the draft commission notice – guidelines on vertical restraints, p. 17.

²⁰⁴ Roth, Peter, Rose, Vivien, Bellamy, Christopher W. & Child, Graham D. (red.), European community law of competition, 6 edition, Oxford University Press, Oxford, 2008, p. 175.

²⁰⁵ Wijckmans, p. 235. The French authority gave its opinion in Decision nr. 06-D-28. Hi-fi and Home cinema, 5.10.2006.

²⁰⁶ Campari OJ 1978 L 70/69, [1978] 2 CMLR 397.

ful when a new product is to be sold or an existing product is to be sold on a new market. That requires however that there is a need for such limitation on the competition in order for the investing distributor(s) to recoup the efforts made and that the restriction does not last for more than two years.²⁰⁷ Secondly, there is a possibility for suppliers to restrict active sales out from a specific area or targeted customer group dedicated for testing of a new product. The period for such a restriction is subject to what is necessary to test or introduce the relevant product on the market.²⁰⁸

4.5.2.5 COJ's judgment in the Pierre Fabre case

As the only case before the COJ concerning restrictions on internet distribution the recently decided Pierre Fabre case is of significant importance. Therefore it deserves its own chapter dedicated even if touched upon in many different contexts in this thesis. In the specific case the COJ took a restrictive approach towards restriction on internet distribution. Pierre Fabre Dermo-Cosmétique was a supplier of luxury cosmetics and required its distributors in a selective distribution system to have an educated pharmacist present when selling its products. The requirement thus undisputedly prevented the distributors from using internet as a distribution channel and the question was whether it was considered as a restriction to its object within the scope of Art 101(1) TFEU and whether it could be exempted under Regulation 2790/1999 (now Regulation 330/2010) or exempted individually under Art 101(3) in the TFEU. The COJ started to clarify that selective distribution systems unavoidably affect competition and restrict competition to their object unless objectively motivated.²⁰⁹ Pierre Fabre Dermo-Cosmétique appointed its distributors objectively with regard to quality requirements that were performed equally towards all distributors. The question was therefore whether the requirements imposed were proportionate and if there was a legitimate aim.²¹⁰ Pierre Fabre Dermo-Cosmétique argued mainly that the requirements aimed to ensure that correct advice was given to the customer, that the products were used properly and finally to preserve its prestigious image. The COJ found that the arguments concerning the need to ensure suitable advice and protection of the customer from wrongful use of the products could not be accepted for distribution of non-prescription medicines and contact lenses with regard to the free movement and existing

²⁰⁷ The Vertical Guidelines, Para 61.

²⁰⁸ The Vertical Guidelines, Para 62.

²⁰⁹ Pierre Fabre, Para 39. See chapter 4.4.6.

²¹⁰ Pierre Fabre, Para 43.

case law.²¹¹ For the purpose of preserving the image the COJ did not consider that as a legitimate aim at all, but without giving any further reasoning.²¹² Important to mention is that the COJ had earlier recognized the importance of preserving prestigious nature of luxury goods,²¹³ but in the relevant case the view taken by the COJ was consequently that the requirement set out by Pierre Fabre Dermo-Cosmétique was not objectively motivated. Since the COJ considered the requirement as being restrictive to its object it could not be exempted under the Regulation 2790/1999.²¹⁴ Neither could the COJ give any preliminary ruling on the possibility to make an individual exemption under Art 101(3) in the TFEU due to the lack of information.²¹⁵

4.5.3 Analysis

The analysis of this chapter aims to define and question the legal position when it comes to objective justifications for restrictions on internet distribution other than those potential requirements clearly expressed in the Vertical Guidelines.²¹⁶ Even though the Vertical Guidelines are theoretically binding only to the Commission itself it is beyond any doubt that they have practical importance as a source for both national competition authorities and companies. This is especially clear in the absence of covering case law in the area.²¹⁷ The Vertical Guidelines are therefore the starting point in the analysis but are contrasted and compared to the opinion of e.g. COJ, authors and the Advocate General.

It is important to realize that the Commission has taken various opinions into consideration in the creation of the Vertical Guidelines. When comparing the draft²¹⁸ with the final Vertical Guidelines some changes can be found.²¹⁹ In the draft the Commission stated that

²¹¹ Pierre Fabre, Para 44 with reference to the Case C-108/09, Ker-Optika, REU 2010, p. I-0000, Para 76.

²¹² Pierre Fabre, Para 46.

²¹³ Treacy, P., Hopson, H., Distribution and the Net – Should suppliers be forced to permit online retailing of their products?, Competition Law insight, 2009, p. 2.

²¹⁴ Pierre Fabre, Para 59.

²¹⁵ Pierre Fabre, Para 50.

²¹⁶ I.e. the scope of the analysis covers primarily justifications referred to in chapter 4.5.2 and not the clear examples given by the Commission such as the requirement of having at least one brick and mortar shop, to purchase a minimum quantity to be sold offline etc.

²¹⁷ See chapter 2.3.3.

²¹⁸ Draft Commission Notice Guidelines on Vertical Restraints, Brussels, SEC(2009) 946/3.

²¹⁹ See chapter 4.3.2.

an outright ban on internet distribution may be objectively necessary given that it does not restrict competition that would have been in the absence of the clause. An example is given where a public ban prohibits the internet distribution in order to preserve health and safety.²²⁰ In the Vertical Guidelines the wording is modified in some ways. They confirm that hardcore restrictions may be objectively necessary in exceptional cases. In contrast to the draft the Vertical Guidelines cover potentially all hardcore restrictions and not only restrictions on internet distribution.²²¹ In one way the Vertical Guidelines seem to narrow the definition of ‘objectively necessary’ by limiting its scope to exceptional cases. On the other hand, the wording in the Vertical Guidelines is not directly depending on what degree competition there would have been in the absence of the restriction but focuses on a particular type or nature of agreements. A similar discussion is however referred to in footnote 1 in Para 60 in the Vertical Guidelines why it still needs to be considered.²²² The Vertical Guidelines do also give an example equal to the one given in the draft which says that a restriction may be objectively necessary when it ensures that a public ban is complied with.

The question that arises is what importance that example has. The Commission stated, itself, in connection to the Pierre Fabre case that the concept of ‘objectively necessary’ must be interpreted restrictively and that the requirements from a supplier must not go beyond what is required from regulations upheld by authorities.²²³ Advocate General Mazak took a less restrictive position and held that the restriction must be of public law character and go beyond the interest in the image and the preferred distribution.²²⁴ Further on the Advocate General Mazak stated however that internet distribution can have negative effect for some products regarding inter alia image and the quality and therefore justify an outright ban.²²⁵ These statements can, on the face of it, seem to contradict each other but are reasonably to be interpreted as saying that restrictions that aim to protect the image or the way of distribution cannot be justified for being within the field of public law but can however be justi-

²²⁰ Draft Commission Notice Guidelines on Vertical Restraints, Brussels, SEC(2009) 946/3, Para 54.

²²¹ The Vertical Guidelines, Para 60.

²²² The Vertical Guidelines, Para 60. Compare with Communication from the Commission – Notice - Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27.4.2004, p. 97 and Case 56/65, *Société Technique Minière (L.T.M.) v. Maschinenbau Ulm GmbH* (1966) ECR 249.

²²³ Advocate General Mazak, Para 33.

²²⁴ Advocate General Mazak, Para 35.

²²⁵ Advocate General Mazak, Para 54.

fied in other exceptional cases. Regarding the relation between public bans and applied restrictions the COJ did not give its opinion which leaves the question open but does not hinder anyone to argue in line with the Advocate General Mazak.

Regarding the COJ's assessment of the health and safety arguing by Pierre Fabre Dermo-Cosmétique it can be clearly seen that it did not present any reasoning but only a statement that the requirement was not accepted due to the free movement of goods. The area of goods concerning cosmetics and lenses was already covered in the regulations stating what products were required to be sold in the presence of a pharmacist. It was undisputed that the relevant products were considered as non-prescription medicines. Consequently Pierre Fabre Dermo-Cosmétique required a pharmacist to be present when selling products within an area that was already regulated and with a requirement more far-reaching than the regulation itself. In this context and from a guidance perspective it is fairly unlucky that the issue, regarding what is objectively necessary and a legitimate aim, was not brought to a head. A pharmacist is not educated to diagnose customers but rather to have knowledge about medicines. Therefore it seems like there was a discrepancy between the argued need to advice and help customers to find suitable products for their precise needs for their specific types of hair and skin and the requirement of an educated pharmacist to be present.

The ruling from the COJ resulted in some interesting aspects. The conflict between the Commission and Pierre Fabre Dermo-Cosmétique arose prior to the commencement of the Regulation 330/2010 and its accompanying Vertical Guidelines. The Regulation 330/2010 was correctly not applicable but the COJ was however free to make reference to the Vertical Guidelines and to clarify its contents relevant for the case. The COJ did not take that opportunity and gave, compared to the Advocate General Mazak, a generally short reasoning for its judgment. The absence of reference to the new Vertical Guidelines was poor since this was the first case before the EU courts regarding internet distribution and the Commission had made a significantly detailed description on how to treat internet distribution but with some gaps for the courts to fill in, e.g. regarding the scope of objectively necessary restrictions.²²⁶ Further guidance would have been appreciated especially with regard to the changes made from the draft and the different opinions expressed relat-

²²⁶ Compare with the criticism in Goyder, J., The Pierre Fabre case Internet sales bans are hard to justify, Competition Law insight, 2012, p. 2.

ed to it.²²⁷ The Commission has taken a major role in the development of the EU competition law through its Vertical Guidelines. As can be seen it has contributed to clarify its position on various issues where it has taken a relatively strict approach. When considering the actual value of the Vertical Guidelines as soft law and thus not a legal source it can be questionable whether it has taken the rules too far as can be questioned on the basis of both this and the other analysis concerning the presumption rules. Market players will probably follow the rules laid down in the Vertical Guidelines and regarding its validity on setting the legal position on vertical agreements that question will remain open until the COJ chooses to give its opinion. Until then, there will be a significant degree of legal uncertainty.

The next question is how the outcome of *Pierre Fabre* affected the general possibility to justify restrictions on internet distribution for health and safety reasons. It has been argued that COJ confirmed the strict approach taken by the Commission in the Vertical Guidelines in the *Pierre Fabre* case.²²⁸ The strict approach was taken in the specific case but that is not to say that the general approach taken by the Commission in the Vertical Guidelines was confirmed. The COJ stated with reference to case law that a selective distribution system necessarily affects competition. It continued by establishing that such systems are to be considered as restrictions by object unless objectively justified.²²⁹ The last statement could not be traced back to prior case law and can be seen a new categorical treatment of selective distribution systems. It does however only establish that those systems need to be objectively justified but not the extent of such justifications.

The confirmation of a strict approach is a reasonable interpretation when it comes to the restrictions made to preserve a prestigious image and the arguing that internet distribution could constitute an unauthorized place of establishment as stated in Art 4 c) in the Regulations 330/2010.²³⁰ The circumstances in the case make it however harder to draw a conclu-

²²⁷ Compare to Vogel, L., *EU Competition Law Applicable to Distribution Agreements: Review of 2011 and Outlook for 2012*, *Journal of European Competition Law & Practice*, 2012 (19 April), under heading: 2. Assessment of the judgment of the Court of Justice.

²²⁸ See for example Goyder, J., *The Pierre Fabre case Internet sales bans are hard to justify*, *Competition Law insight*, 2012, p. 1.

²²⁹ *Pierre Fabre*, Para 39, with reference to *Case 107/82 AEG-Telefunken v Commission* [1983] ECR 3151, Para 33.

²³⁰ Compare however to the judgment from the German Federal Supreme Court *Depotkosmetik im Internet*, judgment 4 November 2003, WuW/E DE-R 1203 where it accepted a supplier's termination of an agree-

sion on the general assessment of restrictions on internet distribution. It seems though that before one conclude such a narrow interpretation it needs to be asked whether the circumstances did really open up for a discussion. It can also be questioned whether the COJ would have come to the same conclusion if Pierre Fabre Dermo-Cosmétique required the presence of a doctor who could actually analyze the customers skin and hair when giving advice or requiring the presence of a seller educated internally to be an expert on the relevant products. These requirements would at least have reduced the discrepancy between the restrictions applied and the aim to be achieved.

It is also uncertain how a case would be treated where similar restrictions were imposed on distributors selling dangerous tools. Could that justify a requirement to sell and advice the customer in the presence of an adviser that ensures that correct information is given and the tool will be used in a safe way? It has been argued in the literature that it might be accepted in some cases for e.g. chainsaws.²³¹ That needs, however, to be compared to the Commissions position on public bans. The sales of dangerous tools are normally not covered by regulations and are left for the companies to perform in a safe way. Does it mean that according to the Commission's reasoning in the Pierre Fabre case,²³² that requirements must not go beyond regulations and obligations set out by authorities? Such an interpretation would result in that a restriction in order to ensure the safe distribution and proper use of such a product would be unlawful. That seems unreasonable when taking into consideration the aim to safeguard the interest of the consumers.²³³

As is described further on the COJ seems to have limited the scope of the Vertical Guidelines in regard of the presumption rules,²³⁴ which shows that the Commission may have taken the pro-internet approach too far, in at least some aspects. Although there are many opportunities given to ensure quality standards in the internet distribution systems, the starting point is still that an out-right ban is very hard to justify. By its procedure concerning the roundtable report and the open up for contribution of opinions for the Vertical Guidelines the Commission has certainly taken both risks and advantages of the use of in-

ment because the distributor sold more than 50 per cent of luxury perfumes through internet distribution with reference to the need for the supplier to limit the negative effect on the products' aura of exclusivity.

²³¹ See the scenario by Wijckmans referred to regarding chainsaws in chapter 4.5.2.2.

²³² Advocate General Mazak, Para 33.

²³³ See chapter 2.2.

²³⁴ See chapter 4.6.

ternet in consideration.²³⁵ It is however questionable whether regard is taken to the fact that all products are not necessarily best distributed over the internet. How would arguments be treated based on economic efficiency? It might result in less cost for the supplier to construct the final product at the brick and mortar shop where the customer purchases the product. That would enable for the supplier to transport the product at lower costs and lower the price for the customer as well. Another question is in what way it could be objectively justified to restrict internet distribution in order to ensure the existence of local distributors within different geographic areas for performing both advices during the purchasing and after sale services. The use of internet enables for a cross border price competition but also a risk for market partitioning where large distributors in low cost countries might put out local distributors in high cost countries from doing business. This might in the short term result in lower prices for customers but could cause problems when aiming to uphold a distribution system where local distributors are necessary in order to provide after sale services, spare parts, further advises and so on. It is uncertain but it would be interesting to see how COJ or the Commission would value that perspective on the consumers.

Regarding the objective justifications technical and high quality products the general approach taken by the COJ is that restrictions on competition relating to the price can be justified if the restriction has a legitimate aim to increase the competition other than concerning the price.²³⁶ It is hard to draw any conclusions from the Pierre Fabre case on how the COJ actually applied the case law for the justifying of high quality products, due to the lack of reasoning. That is the fact although the relevant cosmetics must probably have been considered as high quality products due to its classification as luxury. It can at least be clearly stated that the earlier case law was not overruled but could not be applied in order to justify the restrictions due to the lack of proportionality. Although it was suggested from submission in response to the European Commission's consultation, the Vertical Guidelines did not mention justification for technical and high quality products why it is difficult to establish the approach taken by the Commission as well.²³⁷

²³⁵ See chapter 4.3.2.

²³⁶ Pierre Fabre, Para 40.

²³⁷ Linklaters LLP submission to in response to the European Commission's consultation process regarding the competition rules applicable to vertical agreements, p. 19.

4.6 Presumption rules

4.6.1 General

When the Regulation 330/2010²³⁸ entered into force in 2010 the restrictions in Art 4 in the Regulations 330/2010 was titled hardcore restrictions wherein restrictions on passive and in some cases active sales were included.²³⁹ In its Vertical Guidelines the Commission categorized internet distribution as passive sales generally and in some cases as active sales.²⁴⁰ The Commission did also state that if an agreement contains any hardcore restriction the whole agreement is excluded from the exemption in Regulation 330/2010 and is presumed to fall within Art 101(1) in the TFEU. It continued by stating that it is also unlikely that such an agreement fulfill the criteria for being individually exempted under Art 101(3) in the TFEU.²⁴¹ Practically this means that agreements containing hardcore restrictions can be enforced and sanctioned with no regard taken to the de facto negative market effects since these are already presumed to exist.²⁴² By putting the pieces together it is clear that, from the Commission's point of view, restrictions on internet distribution are presumed to infringe the EU competition law unless it amounts to such active sales that are lawful to restrict under Art 4 in the Regulation 330/2010.

4.6.2 The Double negative presumption

The Commission holds that there is a double negative presumption on hardcore restrictions, including restrictions on internet distribution when considered as passive sales and when considered as active sales in so far it falls within the scope of Art 4 in the Regulation 330/2010.²⁴³ A double negative presumption means that the agreement is firstly presumed to fall within the scope of Art 101(1) in the TFEU and secondly that the agreement is presumed to not be able to individually justify under Art 101(3) in the TFEU with the result that the whole agreement is void and potential fines can be imposed. When an agree-

²³⁸ In the *Pierre Fabre* case Advocate General Mazak and the COJ referred to the previous Regulation 2790/1999 which had the same contents as Regulation 330/2010.

²³⁹ See chapter 2.4.5.6.

²⁴⁰ See chapter 4.4.3.

²⁴¹ The Vertical Guidelines, Para 47.

²⁴² Vogel, L., *EU Competition Law Applicable to Distribution Agreements: Review of 2011 and Outlook for 2012*, *Journal of European Competition Law & Practice*, 2012 (19 April), under heading: 2. Assessment of the judgment of the Court of Justice.

²⁴³ The Vertical Guidelines, Para 47.

ment is considered to be a hardcore restriction the benefit of being exempted under the Regulation 330/2010 is lost for the entire agreement which clearly strikes hard against the companies.²⁴⁴ The Commission has not given any further guidance on how to assess the first negative presumption but practically this must probably lead to a situation where the parties to an agreement containing a hardcore restriction have to show their legitimate aims and that the restrictions are objectively necessary before the complaining party has to argue for the non-fulfillment of the relevant criteria.²⁴⁵

4.6.3 The Pierre Fabre case

The first and only case concerning restrictions of internet distribution after the Regulation 330/2010 entered into force was the Pierre Fabre case.²⁴⁶ Pierre Fabre Dermo-Cosmétique, the supplier, restricted undisputedly the possibility for its distributors in a selective distribution system to sell its products on the internet by requiring a pharmacist to be physically present during the sales. The relevant aspect for this chapter is how the suggested double negative presumptions were treated and whether the COJ confirmed the approach taken by the Commission or not.

Advocate General Mazak started by giving his view on the question furthered by the French competition authority. The question furthered was whether “[...] *a general and absolute ban on selling contract goods to end-users via the internet, imposed on authorised distributors in the context of a selective distribution network, in fact constitute a “hardcore” restriction of competition by object for the purposes of Article 81(1) EC [Article 101(1) TFEU] which is not covered by the block exemption provided for by Regulation No 2790/1999 but which is potentially eligible for an individual exemption under Article 81(3) EC [Article 101(3) TFEU][?]”*. Advocate General Mazak questioned whether the French competition authority and the Commission had mixed the terms ‘restriction of competition by object’ and ‘hardcore restrictions’ and stated himself that these are to be treated separately.²⁴⁷ He held that a restricting object of an agreement has to be determined with regard to the economic and legal context and cannot be decided through

²⁴⁴ Compare to the reasoning in Wijckmans, p. 127-128.

²⁴⁵ Compare to Brenning-Louko, M., Gurin, A., Peepkorn, L., and Viertiö, K., Vertical Agreements: New Competition Rules for the Next Decade, Commission Policy Newsletter, Numer 2, 2010, p. 16.

²⁴⁶ See chapter 4.4.7.2 for a description of the case.

²⁴⁷ Advocate General Mazak, Para 24.

an assessment of an abstract formula.²⁴⁸ Concerning ‘hardcore restrictions’ he held that the adoption of such provisions might give reasons to doubt whether the agreement infringes Art 101(1) in the TFEU but that the object still need to be assessed with regard to the legal and economic context. Thus the agreement cannot be presumed to infringe Art 101(1) in the TFEU.²⁴⁹ A reference was made to case *Pedro IV Servicios*²⁵⁰ which stated that an agreement which does not fulfill all criteria required in an exemption regulation for it to apply will not infringe Art 101(1) in the TFEU unless it has to its object or effect to affect competition within the EU. If that is the case a further examination has to take place to decide whether it can be individually exempted under Art 101(3) in the TFEU.²⁵¹ Advocate General Mazak concluded that an agreement does not necessarily has to its object to restrict competition solely on the ground that it does not fulfill the criteria in an exemption regulation.²⁵²

The COJ interpreted the questions addressed from the French competition authority so that it asked whether the controversial contract term was restricting competition to its object within the meaning of Art 101(1) in the TFEU and, if so, whether it could be exempted under the 2790/1999 Regulation or individually exempted under Art 101(3) in the TFEU.²⁵³ Regarding the assessment of the case the COJ stated that the question whether the contractual term restricts competition by its object must be determined with regard to the objectives aimed to attain in the light of its economic and legal context.²⁵⁴ The COJ then questioned whether the appointment of distributors was made equal to all distributors and was proportionate and established that the agreement was restricting competition to its object and thus fell within the scope of Art 101(1) in the TFEU.²⁵⁵ The court continued by stating that the agreement did not benefit from the block exemption in Regulation

²⁴⁸ Advocate General Mazak, Para 25-26. An exception is however made to some horizontal agreements where there may be a quite truncated assessment.

²⁴⁹ Advocate General Mazak, Para 28.

²⁵⁰ Case C-260/07 [2009] *Pedro IV Servicios* C-2REG 2009.

²⁵¹ Case C-260/07 [2009] *Pedro IV Servicios* C-2REG 2009, Para 68.

²⁵² Advocate General Mazak, Para 29.

²⁵³ *Pierre Fabre*, Para 33.

²⁵⁴ *Pierre Fabre*, Para 35 with reference to Joined Cases C-501/06 P, C-513/06 P, C-516/06 P and C-519/06 P *GlaxoSmithKline Services and Others v Commission and Others* [2009] ECR I-9291, Para 58.

²⁵⁵ *Pierre Fabre*, Para 43-47.

2790/1999 due to the restriction to its object of passive sales.²⁵⁶ Regarding a potential individual exemption under Art 101(3) in the TFEU the COJ declared itself unable to make such an assessment due to lack of information.²⁵⁷ The COJ did not expressly state anything regarding the presumption rule, instead it seems necessary to analyze the general treatment of the case in order to define its position on that question.

4.6.4 Analysis

The double negative presumption set out by the Commission in the Vertical Guidelines is of high importance for market players whose agreements are at risk to fall within the scope of Art 4 in the Regulation 330/2010.²⁵⁸ The fact that an agreement is presumed to neither be group-exempted under the Regulation 330/2010 nor individually exempted under Art 101(3) in the TFEU puts the defendant in a far more difficult situation. In the Pierre Fabre case Advocate General Mazak and the COJ treated the issue in different ways which will be analyzed here in order to define the legal outcome.

Advocate General Mazak took a quite straight forward approach by stating that although it could be doubted whether the agreement was lawful it could not be presumed to infringe Art 101(1) in the TFEU.²⁵⁹ He remarked that the object must be assessed with regard to the economic and legal context which makes it not unreasonable to believe that his statement regarding the presumption rule can be applied to other restrictions than those on internet distribution. When it comes to the second negative presumption concerning the individual exemption in Art 101(3) in the TFEU the opinion of Mazak is not clear to the same extent. He stated that an individual examination is required both in regard of restrictions to its object and for the assessment of individual exemptions under Art 101(3) in the TFEU.²⁶⁰ It is thus reasonable to conclude that the presumption from the Commission must stand back for the individual assessment and that even the second negative presumption is probably not applicable. The burden of proof to show the benefits arising from the agreement, as

²⁵⁶ Pierre Fabre, Para 53-54.

²⁵⁷ Pierre Fabre, Para 50.

²⁵⁸ The Vertical Guidelines, Para 47.

²⁵⁹ Advocate General Mazak, Para 28.

²⁶⁰ Advocate General Mazak, Para 30.

required in Art 101(3) in the TFEU, is however still on the party claiming the exemption.²⁶¹ In most of the cases this will be the infringing party.

The COJ did not expressly mention the presumption rules in particular why guidance needs to be obtained from the general approach taken in the assessment of the case. The COJ followed the method by the Advocate General Mazak as to that it made an overall assessment of the case with regard to the economic and legal context,²⁶² and applied the criteria from earlier case law concerning objectively justified restrictions in selective distribution systems.²⁶³ After having established the existence of a restriction by its object within the scope of Art 101(1) in the TFEU it went further on declaring that the Regulation 2790/1999 was not applicable without giving any deep reasoning. This might lead one to think that this was an expression for the presumption that the agreement should not be exempted under the Regulation 2790/1999. Another, perhaps more correct, interpretation is that the COJ had already under the first question established the existence of a restriction to its object according to Art 101(1) in the TFEU. The wording in Art 4 in the Regulation 2970/1999 did also require restriction to its object but since the COJ had already made that assessment it was unnecessary to apply the same criteria again. The restriction in the case did undisputedly restrict passive sales in a selective distribution system which was considered one of the hardcore restrictions. The COJ could therefore without any further assessment conclude that the agreement did infringe Art 101(1) in the TFEU and was not exempted under the Regulation 2790/1999. This seems not to have been the result of an application by the presumption rule but rather from the assessment of the first question together with the fact that the agreement clearly restricted passive sales.

The presented interpretation is not fully rooted in the case but seems to be the most reasonable one. In the question regarding the presumption rules the COJ was vague in its wording, or more accurately, in the absence of any wording. At least on the first presumption, the Advocate General was clear on this point and the COJ remained silent by giving guidance only in its way to treat the case in general which has given rise to criticism.²⁶⁴ The

²⁶¹ Advocate General Mazak, Para 66 with reference to Art 2 in the Regulation 1/2003.

²⁶² Pierre Fabre, Para 35.

²⁶³ Pierre Fabre, Para 34-47.

²⁶⁴ Vogel, L., EU Competition Law Applicable to Distribution Agreements: Review of 2011 and Outlook for 2012, *Journal of European Competition Law & Practice*, 2012 (19 April), under heading: 2. Assessment of the judgment of the Court of Justice.

COJ did not make any reference to the Vertical Guidelines and did not expressly declare the presumption rules inapplicable but from its actions it can be seen as a smooth way of stating that the Commission went beyond its power in this regard, at least for internet distribution. If the presumption rules would have applied there would not have been a need for the COJ to make an analysis in the assessment at the first stage. Instead it would have been up to the defendant Pierre Fabre Dermo-Cosmétique to show documentation proving the benefits and thereby rebut the presumption. Such a declaration could not be seen in the case which also support that the COJ considered there to not be any presumption.

When analyzing the impact of the Commission's proposed presumption rules it is necessary to put it in the context of Art 101(1) in the TFEU and the hardcore restrictions in Regulation 330/2010. Internet distribution is presumed to be passive sales,²⁶⁵ on which restrictions are generally considered as hardcore. A hardcore restriction is a restriction that has as its object, not necessarily its effect, to restrict competition. The Commission's presumption rules would thus strike against all restrictions on internet distribution, except for those examples accepted in the Vertical Guidelines, and on beforehand declare its object as restricting competition. This way of looking at the potential restrictions makes it easier for the Commission or the relevant national competition authority to apply the rules. If a hardcore restriction is at hand it is for the defending party to show positive effects before the party claiming the breach has to prove the opposite. If there was a requirement to show that the actual object was to restrict internet distribution and not to achieve other reasonable benefits from setting up certain requirements it would put the party claiming the infringement in a far more difficult position. The same goes with the proving of restrictions to their effects where a product and geographic market analysis would have to take place which requires significant efforts.²⁶⁶

With this in mind such a presumption is strange from at least two points of view. Firstly, both the Art 101(1) in the TFEU and Art 4 in the Regulation 330/2010 cover agreements which has as its object to restriction competition. If for example a supplier wants to ensure that the products are correctly used or that suitable advice is given to the customer which requires physical presence, could it actually be presumed that the object or intention is to restrict the use of internet and not to achieve all other potential benefits? Can such re-

²⁶⁵ Wijckmans, p. 228.

²⁶⁶ See chapter 2.4.5.3 where the assessment of product and geographical market is described.

quirements always be presumed to unlawfully restrict competition? The second point is the nature of the assessment. The COJ states itself that the assessment of whether an agreement restricts competition to its object must be made with regard to the economic and legal context with reference to existing case law.²⁶⁷ The suggestion of a presumption, that an object to restrict competition exists in cases containing hardcore restrictions, which shall co-operate with case law stating that such an object needs to be assessed in the light of its context, constitutes an obvious paradox. From this reasoning it is not unlikely that the COJ followed the opinion of Advocate General Mazak that the Commission stretched the prevention of restrictions on internet distribution too far in this aspect and that no such presumption shall apply in regard of internet distribution.

²⁶⁷ Pierre Fabre, Para 35 with reference to Case C-501/06 etc GlaxoSmithKline v Commission, [2009] ECR I-9291, [2010] 4 CMLR 50, Para 58.

5 Conclusions

5.1 Objective justifications

The first question raised in the purpose of this thesis was what does generally amount to objectively necessary hardcore restrictions on internet distribution? The thesis has showed that it is difficult to draw a general line and distinguish objective justifications from those that are not, but there are some important points to be made. The Vertical Guidelines state the possibility to justify restrictions on internet distribution due to the compliance with a public ban, e.g. for the purpose of protecting health and safety. In the Pierre Fabre case the Advocate General Mazak extended that possibility to impose restrictions for reasons that are of public law character. The COJ stated that there is a possibility to restrict competition due to health and safety but such restrictions must be applied equally to all distributors with regard to quality nature, non-discriminatory and proportionate. On the face of it that judgment can seem to confirm a strict approach towards restrictions on internet distribution but the conclusion herein is that the legal position still remains uncertain. The circumstances in the case gave that there were other less restrictive means that the infringing party could have used to achieve the same aim why it was less surprising that the COJ considered it as unlawful. The conclusion is therefore that the uncertainty remains on what justifications are generally accepted for health and safety reasons and will probably continue until the COJ gives a judgment with a more clear reasoning.

The COJ has also stated that restrictions may be considered as objective justifications due to technical and high quality products. That requires however that the main competition for the relevant product refers to other than the price. The COJ did mention this possibility in the Pierre Fabre case but since the restrictions imposed regarded health and safety reasons the potential justifications due to technical and high quality products were not assessed in great detail. Furthermore, the Vertical Guidelines give the possibility to restrict both active and passive sales into a limited geographic area or a targeted customer group for up to two years when introducing a new product on the market or an already existing product into a new market. Active sales from a certain territory or to a certain customer group might also be restricted when that territory or customer group is targeted for testing of new products. These restrictions are though subject to limited situation where they are necessary due to the actual circumstances. The conclusion is therefore that such restrictions together with any other directly or indirectly outright bans on internet distribution must be carefully constructed and performed.

5.2 The double negative presumption rule

The second question aimed to be answered was whether there is a double negative presumption that an agreement containing a hardcore restriction in an internet distribution context has as its object to restrict competition and thus be infringing Art 101(1) in the TFEU and that such an agreement is likely to not fulfill the requirements for being individually exempted under Art 101(3) in the TFEU. In *Pierre Fabre*, the first case that came before the COJ regarding internet distribution, the issue was taken to its head. The Advocate General clearly expressed that such a presumption does not exist and held that the question whether an agreement which restricts competition to its object needs to be assessed in its economic and legal context. The COJ did not expressly follow the wording of the Advocate General but the conclusion is that it took the same position by its way of judging in the case. The relevant agreement undisputedly restricted passive sales in a selective distribution system which constitutes one of the hardcore restrictions. If the presumption stated by the Commission in its Vertical Guidelines was accepted by the COJ this would have been a typical case for it to apply. Another aspect is that the nature of the rules where both Art 101(1) in the TFEU and the Art 4 in the Regulation 330/2010 requires an agreement to have as its object to restrict competition for being considered as an infringement. The determination of an object to restrict can hardly be presumed on forehand since it needs to be assessed in its relevant context. The conclusion is therefore that it is reasonable to define the legal position so that restrictions on internet distribution that amount to hardcore restrictions are not presumed to infringe Art 101(1) in the TFEU.

Regarding the second presumption that an agreement containing a hardcore restriction is also presumed to not fulfill the requirements for being individually exempted under Art 101(3) in the TFEU it is difficult to conclude the actual legal position. The COJ stated in the *Pierre Fabre* case that it could not give any guidance due to lack of information. The general assessment in the case points however towards that there is no such rule but that conclusion cannot be considered as strongly confirmed by the COJ.

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Appendix I

Treaty on the Functioning of the European Union, consolidated text, OJ C 83, 30.3.2010

Article 101

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development, or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,
- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Appendix 2

Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices

Article 4

Restrictions that remove the benefit of the block exemption — hardcore restrictions

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

- (a) the restriction of the buyer's ability to determine its sale price, without prejudice to the possibility of the supplier to impose a maximum sale price or recommend a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties;
- (b) 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:
 - (i) the restriction of active sales into the exclusive territory or to an exclusive customer group reserved to the supplier or allocated by the supplier to another buyer, where such a restriction does not limit sales by the customers of the buyer,
 - (ii) the restriction of sales to end users by a buyer operating at the wholesale level of trade,
 - (iii) the restriction of sales by the members of a selective distribution system to unauthorised distributors within the territory reserved by the supplier to operate that system, and
 - (iv) the restriction of the buyer's ability to sell components, supplied for the purposes of incorporation, to customers who would use them to manufacture the same type of goods as those produced by the supplier;
- (c) 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;
- (d) the restriction of cross-supplies between distributors within a selective distribution system, including between distributors operating at different level of trade;
- (e) the restriction, agreed between a supplier of components and a buyer who incorporates those components, of the supplier's ability to sell the components as spare parts to end-users or to repairers or other service providers not entrusted by the buyer with the repair or servicing of its goods.