



FACULTY OF LAW
LUND UNIVERSITY

ANNA-LIISA AASRAND

DO THE LIMITATIONS ON VERTICAL RESTRICTIONS
SET BY EUROPEAN UNION CONFLICT WITH THE
PRINCIPLE OF FREE MARKET ECONOMY?

JAEM01 MASTER THESIS

EUROPEAN BUSINESS LAW
15 HIGHER EDUCATION CREDITS

SUPERVISORS: XAVIER GROUSSOT AND BJÖRN LUNDQVIST

TERM: SPRING 2013

CONTENTS

SUMMARY	2
ABBREVIATIONS	5
1. INTRODUCTION	6
1.1. Historical starting points	6
1.2. Aim of the study.....	8
1.3. Structure of the study	8
1.4. Method of the study	9
2. MARKET ECONOMY.....	10
2.1. Definition	10
2.2. Features	10
2.3. Competition policies and freedom of economy	11
3. VERTICAL AGREEMENTS	15
3.1. Distribution agreements	15
3.2. Agency agreements	17
3.3. Franchise agreements.....	19
4. LIMITATIONS IN LEGISLATION	20
4.1. 2001 Notice on agreements of minor importance (<i>de minimis</i> Notice)	21
4.2. Regulation 330/2010 on Vertical Agreements	22
4.3. 2010 Commission’s Guidelines on Vertical Restraints	25
4.4. 1986 Directive 653 on self-employed commercial agents	26
5. LIMITATIONS IN CASE LAW – INTERPRETATION OF LEGISLATION ...	27
6. CONCLUSION	31
LIST OF REFERECES	33
Books and Independent Publications	33
Articles.....	34
Other sources	34
Table of cases.....	35
Table of legislative acts	37

SUMMARY

Various academics have pointed out that the aim of EU competition laws was initially to preserve individual economic freedoms and access to the market. Pursuant to their standpoint, if individuals' economic freedoms are maximized, it means that there is a liberal market economy with a fierce competition, to which we ought to be grateful for our relatively successful economies. However, it appears from the recent case law of CJEU, guidelines enforced by the European Commission and legislation passed within the recent years that the EU's attitude, as well as the member states', has shifted over time and the main priority now is claimed to be consumer welfare. Protecting the consumer welfare, however, means prohibiting economic entities' freedoms to take actions that hinder competition in any way that may result in raised prices.

Bearing that in mind, the author asks whether this changed perspective has run contrary to liberal market economy principles, which the Union founders had in mind. The analysis is made on the example of vertical agreements and the restrictions stipulated therein, which are regulated in various forms by the EU's institutions. In order to answer the question set forth above, the author has taken an economic law approach, which examines this particular political agenda in an economic context. This approach was chosen because it is the only way to understand the right justifications for regulating competition between economic entities.

Free market economy is an economic system where the demand and supply dictate production. It is a system, which operates independently and where the government does not intervene. As a rule of thumb, the latter intervenes only to preserve economic freedom valid at the market. This system ideally brings prosperity to sovereign economies; however, it also has several flaws, which make the government intervention necessary at some point. For example, some agreements concluded by companies may obstruct competition and may eventually lead to a monopoly or otherwise decreased economic progress. History has shown that the intensity of governments' intervention into economy has changed over time with the help of various schools of competition policy theories. However, it has turned out that those tendencies have been more or less taken place simultaneously in the US and EU, whereas now arriving in a more liberal stadium compared to the 1960ties, for example.

That allows to reason that the attitude towards vertical restrictions is perhaps liberalized too.

In distribution agreements one could often find clauses that, *inter alia*, stipulate an exclusive right to distribute the suppliers' products in a particular area or dictate to the distributor the prices the latter use when selling the supplier's products. An Agent and a principal may want, for example, to agree that the agent will not actively approach certain groups of customers or prohibit the agent to sell products that compete with the principal's products. On the other hand, in franchise agreements the franchisee usually promises to buy certain quantity of products from the franchisor. All these and many other restrictions may be blended between different forms of agreements.

Vertical agreements are not seen as having as bad an effect on competition and common market as horizontal agreements, due to the fact these are not generally made between competitors. However, there are also various restrictions in vertical agreements that are seen as unlawful by EU competition authorities. The Commission has specified application of the Article 101 TFEU that prohibits uncompetitive agreements in secondary legislation (for instance, guidelines, recommendations). *De minimis* Notice states that restrictive agreements, which are made between financially insignificant companies, are generally excused from these restrictions imposed by the public authorities. Somewhat bigger companies, on the other hand, may find safe harbor in the block exemption Regulation that exempts agreements by categories. For instance, if the market share of a company is smaller than 30% of the relevant market, then the Commission generally will not intervene in its affairs. In Vertical Guidelines, the Commission explains in detail the restrictions and agreements that are and are not excused. In general, it provides that if provisions play a part in creating restrictive effects on entering into market and trade between Member States, they may infringe Article 101 TFEU.

The EU case law shows that both the Courts and the Commission are increasingly considering economic and legal context when making their decisions. This emphasizes and points out that the subject elaborated hereunder is topical and widely discussed by both practitioners and academics. There are hard-core restrictions such as price fixing

that are still seen as unlawful, but the institutions seem to be willing to cooperate and allow the parties to alter their agreements to comply with the competition rules.

When it comes to vertical agreements, it appears from the recent case law of CJEU, guidelines enforced by the European Commission and legislation passed within the recent years that the EU is not overly strict but rather supportive to economic activity and therefore does not conflict with the principles 'ordoliberal' market economy.

ABBREVIATIONS

CMLR	Common Market Law Reports
E.g.	Exempli gratia (for example)
CJEU ¹	Court of Justice of the European Union
ECR	European Court Reports
ECSC	European Coal and Steel Community
Ed.	Edition
EEC	European Economic Community
Et al.	Et alii (and others)
Etc.	Et cetera (and so on)
EU	European Union
GmbH	Gesellschaft mit beschränkter Haftung
I.e.	Id est (that is to say)
Ibid.	Ibidem (same place)
Ltd.	Limited
No.	Number
OJ	Official Journal of the European Union ²
p.	Page
Para.	Paragraph
pp.	Pages
SA	Société Anonyme
TFEU	Treaty on the Functioning of European Union
UK	United Kingdom
v.	Versus
Vol.	Volume
US	United States

¹ With the entry into force of the Treaty of Lisbon in 2009, the European Court of Justice changed its name to the Court of Justice of the European Union. Reference to the CJEU will therefore be given and not to the prior name of the court.

² With the entry into force of the Treaty of Nice in 2003, the Official Journal of the European Communities changed its name to the Official Journal of the European Union. Both journals are abbreviated herein as OJ.

1. INTRODUCTION

1.1. Historical starting points

There are various opinions of why regulating competition is necessary and what the importance of competition is. One of the most influential schools for the creation of European Union (EU) competition laws came from Germany.³ According to the Freiburg School of thought, later known as Ordoliberalism⁴, competition is needed for the economic freedom of individuals⁵. Furthermore, western countries have proudly preserved its capitalistic market economy where, instead of letting the state to take over, supply and demand coordinate distribution and costs. Indeed, named approach has proven to be vastly beneficial for the growth of the economies. For instance, exemplifying the aforesaid success one may examine the economies of post-soviet countries whereas during communistic reign their economies were in rags. However, after gaining independence and, *inter alia*, domestically adopting the free market principle, these economies started to prosper swiftly - Estonia being the frontrunner⁶. Apparently, the market economy leads to a competitive environment, which in turn brings along economic efficiency⁷.

Before the European Coal and Steel Community (ECSC) was created in 1951, Ordoliberal thinkers had introduced a third way in the 30ties, next to the contemporary democracy and communism, how the society could work. They offered a solution where the market is open and individuals are free to do their business as they wish but unlike the classical liberalists, they saw the necessity of regulating competition in order to secure individual freedoms against government and other economic entities.⁸

³ Jones, A. and Sufrin, B. (2008) *EC Competition Law*, 3rd ed, p 37, Oxford, UK: Oxford University Press

⁴ Cseres, K. J. (2005) *Competition Law and Consumer Protection*, p 83, Hague, The Netherlands: Kluwer Law International

⁵ Parret, L. (2010), 'Shouldn't We Know What We are Protecting - Yes We Should - A Plea for a Solid and Comprehensive Debate about the Objectives of EU Competition Law and Policy', p 348, *European Competition Journal*, Vol. 6, No 2, August 2010, pp 339-376

⁶ Rahn, R. W. (2011) 'Estonia's Free-Market Principles Prevailing', Newsmax, retrieved from <http://www.newsmax.com/Rahn/estonia-freemarket-economy/2011/06/21/id/400766>

⁷ Akman, P. (2012) *The Concept of abuse in EU competition law - Law and economic approaches*, p 25, Oxford, UK: Hart Publishing Ltd.

⁸ Cseres, K. J. (2005) *Competition Law and Consumer Protection*, p 83, Hague, The Netherlands: Kluwer Law International

Ordoliberals saw individual economic freedom as a goal in itself and competition was supposed to be attained by this. That principle of protecting individual freedom became the fundamental objective of Article 65 of the Treaty of Paris, which first dealt with agreements and concerted practices that could restrict normal competition in the Common Market.⁹ The main things that were tried to protect by this provision were the market access and freedom of action¹⁰. Indeed, a Nobel-Prize winning economist Milton Friedman has also stated, ‘The only way that has ever been discovered to have a lot of people cooperate together voluntarily is through the free market. And that's why it's so essential to preserving individual freedom.’¹¹

Competition as a stimulus of market efficiency must be protected by fit competition law regulations. By taking a legal approach, the aim of competition law is to protect competition together with individual economic freedom, whereas from the economic perspective the aim of the aforesaid is consumer welfare.¹² However, some academics say that in practice these aims overlap¹³ - competition *results* in consumer welfare.

In consumer welfare analysis, the relevance of competition is the prevention of increased prices for consumers.¹⁴ The objectives of competition policies change over time and by now, the EU objectives seem to be leaning towards the same attitude as of many European sovereign competition authorities. The latter have stipulated in their mission statements that the goal of their competition law is ultimately, or even

⁹ ‘All agreements between undertakings, decisions by associations of undertakings and concerted practices tending directly or indirectly to prevent, restrict or distort normal competition within the common market shall be prohibited...’ Art 65 (1), Treaty Establishing the European Coal and Steel Community (1951), retrieved from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:11951K:EN:PDF>

¹⁰ Cseres, K. J. (2005) *Competition Law and Consumer Protection*, p 248, Hague, The Netherlands: Kluwer Law International

¹¹ Vasigh, B. et al (2008) *Introduction to Air Transport Economics: From Theory to Applications*, p 29, Hampshire, UK: Ashgate Publishing Ltd, citing Milton Friedman

¹² Baarsma, B. E. (2011) ‘*Rewriting European Competition Law from an Economic Perspective*’, *European Competition Journal*, Vol. 7, No 3, pp 559-585

¹³ Ibid.

¹⁴ Cseres, K. J. (2005) *Competition Law and Consumer Protection*, p 20, Hague, The Netherlands: Kluwer Law International

primarily, consumer protection¹⁵ instead of economic freedom as initially prioritised by the founders of the ECSC¹⁶.

The Court of Justice of the European Union (CJEU) recognized the importance of competition when it postulated that the EU competition law principles are considered as fundamental principles of law¹⁷, which are to be eagerly protected within and by this Union. The Commission and Courts have successfully interpreted and specified Article 101 of TFEU that deals with all kinds of agreements between firms, which may be harmful towards competition.

1.2. Aim of the study

Therefore, at times it appears that by prohibiting various actions of economic entities in order to protect consumer welfare, the EU institutions seem to have neglected why they started to protect the efficiency of competition in the first place – as various academics have pointed out – the individual economic freedom. Therefore, the author of this research makes an attempt to answer to the question whether the EU has regulated agreements concluded between market participants too excessively by way of legislation and case law and therefore collided with the principle of free economy? This paper aims to look into the limits implemented specifically on undertakings that are in vertical relationships.

1.3. Structure of the study

In order to answer that, the author firstly explains the meaning of market economy and its relation to the competition policies over time.

¹⁵ Baarsma, B. E. (2011) 'Rewriting European Competition Law from an Economic Perspective', *European Competition Journal*, Vol. 7, No 3, pp 559-585

¹⁶ Cseres, K. J. (2005) *Competition Law and Consumer Protection*, p 248, Hague, The Netherlands: Kluwer Law International

¹⁷Case C-126/97, *Eco Swiss China Time Ltd, v Benetton International BV*, 1 June 1999, [1999] ECR I-3055

Secondly, three forms of vertical agreements and common restrictive clauses, which may be prohibited thereunder, are separately focused on. The author chose to concentrate on distribution, agency and franchise agreements, taking into consideration that these are the most frequently used vertical agreements.¹⁸ Although online distribution is another vertical relationship with great importance, it is not handled separately in this research since it can actually occur in every distribution formula, and is therefore assessed accordingly. One thing to keep in mind about online distribution, though, is that it is regarded as a passive method of sales in competition law context.¹⁹

Thirdly, the paper dissects the limitations applicable to the restrictions that are outlined in the EU legislation and analyses the reasons for such restrictions.

Subsequently, the limitations stemming from the CJEU case law will be explained together with the grounds of those rulings. This part will particularly characterise how the courts and the Commission have interpreted those limits in the EU legislation.

Finally, the paper ends with an assessment whether the principle of free economy and the EU competition regulations are in conflict or not.

1.4. Method of the study

In this research, the author has used law and economics as method of the research because competition law closely relates to economics and it is hard to explain adequately the occurrences therein without applying economic concepts. In order to understand the reasoning and purpose that the legislator wished to achieve with Article 101 of the TFEU, the author uses analytical-theological method for understanding the substance of the principles and limitations deriving from the aforesaid provision. The writer has done the analysis via positive approach, describing the situation and trying to see the economic impact of EU's competition law policy on individual economic freedom.

¹⁸ Wijckmans, F. and Tuytschaever, F. (2011) *Vertical Agreements in EU Competition Law*, Oxford, UK: Oxford University Press

¹⁹ Ibid. p 227

Thus, first thing to clear out is the essence of market economy.

2. MARKET ECONOMY

2.1. Definition

Put simply, free market economy is a system where demand and supply dictate production. The prices of goods or services are directly dependant on both demand and supply.²⁰ If nobody wants the item, its price is lowered. If everybody wants it, the price gets higher. Nevertheless, the delivery network, which creates vertical relationships, is also of essential character, as Andrew Gillespie and many other economists have admitted.²¹ Without distribution, only a very small share of people would receive the products, but there is no point in producing goods just to keep these in one's own warehouse. Therefore, it is only logic that a delivery system also affects production. Those arguments are based on an assumption that people are rational beings and that buyers want to maximise their benefit whereas the producers want to maximise their profits.²² In a free market economy, it is up to the business owners to decide all aspects of the price, production and distribution of the products.²³

2.2. Features

There are certain basic notions of a truly free economy. Interesting is that usually all of these are not pursued at the same time but it is argued that if they were, the economy would grow faster than with any other scheme.²⁴ First idea is that free economy runs by itself and the changes take place organically depending on the demand and supply, not by artificially directing the course of it with legislative regulations. In a free market economy, it is understood that people themselves are the best deciders what to buy or

²⁰ Gillespie, A. (2011) *Foundations of Economics*, p 114, Oxford, UK: Oxford University Press

²¹ Ibid.

²² Ibid.

²³ Kates, S. (2011) *Free Market Economics: An Introduction for the General Reader*, p 1, Glos, UK: Edward Elgar Publishing Limited

²⁴ Ibid. p 14

produce. They make those decisions based on self-interest. Consequently, firms are created by people as the result of their spontaneous will and not by the government as a political activity. This is so because people who run firms out of their self-interest are prone to make better economic decisions than those who make decisions out of political interests. In this system, governments should form laws so that the economic activities in private sector are supported. Different techniques have developed for economic governing and this is a continuing process described further on. Next, what is bought is actually financed by what is sold. In other words, supply finances demand. That goes with the next notion that the producers who make things that are paid for, actually create money's value. The main government's role to maintain this value should be not to spend more money than earned by taxes and make sure banks receive the money they have lent. Additionally, businesses instead of governments decide what to produce and how to invest its money in a free market economy. By doing so, they determine their own necessity and fate in the economy.²⁵

2.3. Competition policies and freedom of economy

The above described is a perfect free market system. However, such perfect system does not exist. Indeed, '[n]o market is or ever has been even remotely laissez-frère.'²⁶ Every state has put down some rules and barriers by its legislative force, *inter alia*, to preserve competition. The real question thus is how far should the authorities go when regulating economic activity?²⁷ Through times, the answer to this has taken many shapes. Next, the author makes a short historical overview of different competition policies in order to understand what influenced the Europe's response to the abovementioned question.

First modern competition laws were introduced as late as 1890 in the United States of America.²⁸ Sherman Antitrust Act declared illegal all agreements that restrict trade

²⁵ Kates, S. (2011) *Free Market Economics: An Introduction for the General Reader*, pp 14-20, Glos, UK: Edward Elgar Publishing Limited

²⁶ Ibid. p 1

²⁷ Gillespie, A. (2011) *Foundations of Economics*, p 115, Oxford, UK: Oxford University Press

²⁸ Jones, A. and Sufrin, B. (2008), *EC Competition Law*, 3rd ed, p 19, Oxford, UK: Oxford University Press

among States or with foreign countries.²⁹ The reason for the Congress to pass this Act was mostly to fight with the growing trend of trusts and cartels in the United States (US).³⁰ At first, the competition rules introduced in Sherman Act were not enforced very strictly; however the Supreme Court gradually expanded their application. For example, the Supreme Court ruled that price maintenance clauses in vertical agreements are illegal *per se* not until 1911,³¹ and subsequently confirmed this decision in later judgments.³² After that came a wave of regulations in the sphere of competition policy.³³ However, the most active anti-trust movement took place from 1940ties until 70ties,³⁴ which was the time when Harvard school of thought had most influence on competition policy.³⁵

Harvard school introduced the analysis of competition through a paradigm of the structure-conduct-performance (S-C-P). It meant that market structure shapes the conduct of the firm and that in turn establishes its performance. J.S. Bain, who was one of developers of the idea of S-C-P paradigm, found in his empirical studies that the structures of the industries were too concentrated and there were high barriers to enter into market. These findings led to an extremely interventionist era in the US anti-trust policy where extensive amount of economic activities were considered as anti-competitive.³⁶ Indeed, the scholars agree that it was time of increasing complexity and formalism in the EU competition laws as well.³⁷

The academics from University of Chicago started to criticize the Harvard standpoints in the 1970ties as having several mistakes in their theories. Chicago school stood for

²⁹ 'Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.' 15 U.S.C. § 1, retrieved from <http://www.law.cornell.edu/uscode/text/15/1>

³⁰ Motta, M. (2004) *Competition Policy: Theory and Practice*, p 3, Cambridge, UK: Cambridge University Press

³¹ U.S. Sup Ct, *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), retrieved from <http://supreme.justia.com/cases/federal/us/220/373/case.html>

³² Motta, M. (2004) *Competition Policy: Theory and Practice*, p 4, Cambridge, UK: Cambridge University Press

³³ *Ibid.* pp 5-7

³⁴ *Ibid.* p 7

³⁵ Jones, A. and Sufrin, B. (2008), *EC Competition Law*, 3rd ed, p 22, Oxford, UK: Oxford University Press

³⁶ *Ibid.* p 22

³⁷ Gerber, D. J. (2007), *Two Forms of Modernization in European Competition Law*, p 1239, *Fordham International Law Journal*, Vol. 31, Issue 5, Art 8

the free market without government intervention and that the goal of competition laws should *only* be pursuit of allocative efficiency. Unlike Harvard academics, they did not protect small businesses but instead had a view that it does not matter who wins or loses, provided that the efficiency is attained.³⁸ Although their ideas too were seriously criticized, *inter alia*, for being too simple because they did not accurately show how businesses behave in the real world, it nevertheless deeply changed the view on competition laws from then on.³⁹ This so-called market fundamentalism and the belief that an ‘invisible hand’ controls the economic processes were especially propagated by Ronald Reagan and Margaret Thatcher in the 80ties,⁴⁰ perhaps thinking what William J. Baumol stated in his book: ‘Whatever the deficiencies of the free market, it is certainly very good at one thing: the manufacture of economic growth.’⁴¹

However, this system is no exception in that it has several failures and imperfections when applied in reality.⁴² Therefore, around mid-1980ties⁴³ a so called ‘post-Chicago’ school began to improve the ‘pure Chicago’ concepts to a more complex level in order to conform to the actual reality. It accepted that the goal of competition is efficiency but took into account the difficulties that actually arise when planning the competition rules.⁴⁴ For example, when Chicago scholars came to a conclusion that predatory pricing is almost never rational in a free market economy then post-Chicago thinkers argued that such strategy *could* be reasonable when one wants to stop rivals to enter into the market.⁴⁵

Another example is that in a free market where the fittest win, instead of increasing competition the system sometimes creates monopolies.⁴⁶ If a company gets too successful, it may become dominant in its relevant market and consequently eat out all

³⁸ Jones, A. and Sufrin, B. (2008) *EC Competition Law*, 3rd ed, p 23, Oxford, UK: Oxford University Press

³⁹ Ibid. p 30

⁴⁰ Albi, A. (2008), ‘Eesti õigusteadus, globaliseeruv maailm ja äärmusliberaalne majandusideoloogia’, p 449, *Juridica*, Vol. VII, 2008, pp. 443-461, ISSN 1406-5495

⁴¹ Baumol, W. J. (2002), *The Free Market Innovation Machine: Analyzing the Growth Miracle of Capitalism*, p. 2, New Jersey, USA: Princeton University Press

⁴² Gillespie, A. (2002), *AS & A Level Economics Through Diagrams*, p 23, Oxford, UK: Oxford University Press

⁴³ Crane, D. A. (2008) *Chicago, Post-Chicago, and Neo-Chicago*, a review of *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust* edited by Robert Pitofsky (2008) Pp xiv, 309, p 1913, *The University of Chicago Law Review*, Vol. 76, Issue 4, Fall 2009

⁴⁴ Jones, A. and Sufrin, B. (2008) *EC Competition Law*, 3rd ed, p 32, Oxford, UK: Oxford University Press

⁴⁵ Ibid. p 30

⁴⁶ Ibid. p 23

its competitors.⁴⁷ Monopolised markets, on the other hand, tend to decrease efficiency compared to competitive markets.⁴⁸ This situation can happen, for example, if companies make agreements, which essentially prohibit each other to compete on the same market or exclude one party from doing business in a certain geographical area. For this and other reasons related to general wellbeing of a society, it is necessary for the government to intervene in the economy. Indeed, it seems clear in the context of economical crises that the market in practice cannot regulate itself. At least not in a sustainable manner.⁴⁹

Nevertheless, Chicago school started slowly to penetrate to the EU after the Soviet Union collapsed in the beginning of 1990ties when first incentives to modernize the EU competition laws emerged. The Commission understood that as new Eastern European states would accede to EU, the Directorate-General for competition would have a work overload. Therefore, it advocated a modernization procedure by which the competition administration was going to be greatly decentralized among the Member States' competition authorities and the whole competition enforcement system would be simplified.⁵⁰ In 1999, the EU was at the point where Commission was able to pass a white paper on the aforesaid transformation,⁵¹ and Regulation in 2002⁵² of the same. With these procedural changes, also substantive changes took place. In mid-1990ties, EU started increasingly to receive criticism on its approach particularly on vertical restraints.⁵³ To many academics, it became apparent that the form-based approach used so far on the assessment of vertical agreements was wrong since it was not dependant on the effects of these.⁵⁴ It is argued that around this time, EU slowly started to

⁴⁷ Jones, A. and Sufrin, B. (2008), *EC Competition Law*, 3rd ed, p 23, Oxford, UK: Oxford University Press.

⁴⁸ Ibid. p 92

⁴⁹ Albi, A. (2008), 'Eesti õigusteadus, globaliseeruv maailm ja äärmusliberaalne majandusideoloogia', p 456, *Juridica*, Vol. VII, 2008, pp 443-461, ISSN 1406-5495

⁵⁰ Gerber, D. J. (2007) *Two Forms of Modernization in European Competition Law*, p 1236, *Fordham International Law Journal*, Vol. 31, Issue 5, Art 8

⁵¹ European Commission White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty (1999) Commission programme No 99/027, COM(1999) 101, retrieved from http://europa.eu/documents/comm/white_papers/pdf/com99_101_en.pdf

⁵² Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (2002) OJ L 1, retrieved from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:001:0001:0025:EN:PDF>

⁵³ Gerber, D. J. (2007) *Two Forms of Modernization in European Competition Law*, p 1248, *Fordham International Law Journal*, Vol. 31, Issue 5, Art 8

⁵⁴ Ibid. p 1249

embrace the viewpoints of neoclassical liberalists and with the latter – the main objective of EU competition laws as being the consumer protection.⁵⁵ Guidelines on the law of vertical restraints was given out in 1997 and it instructed that the vertical agreements shall not be assessed by their form anymore but only by the effects which they created in certain conditions.⁵⁶ The Commission's new approach to the goal of competition laws became apparent when similar Guidelines on horizontal agreements were produced in 2001.⁵⁷

Next are brought out vertical agreements and the restrictions they often contain that may or may not have a bad effect on competition and/or consumer welfare.

3. VERTICAL AGREEMENTS

3.1. Distribution agreements

Distribution agreements are vertical agreements, which are made between undertakings that are on different level of production and distribution chain. Vertical relations and agreements clearly have a crucial function in sovereign economies. These agreements are the link between manufacturers and retailers and such link is the key element in delivering products from the producer to the end-users. It is rather uncommon that a manufacturer sells its products to end-customers by itself.⁵⁸ This is where the distribution agreements stipulating the terms of the product supplement and distribution of the same, concluded between a manufacturer (or any kind of supplier) and a wholesaler (or any kind of distributor) come into play.

Surely, there are different forms of distribution agreements - in some, the distributor obtains the exclusive right to distribute the supplier's products and in others, such

⁵⁵ Gerber, D. J. (2007) *Two Forms of Modernization in European Competition Law*, p 1236, Fordham International Law Journal, Vol. 31, Issue 5, Art 8

⁵⁶ EC Communities' Green Paper on Vertical Restraints (1997), retrieved from http://europa.eu/documents/comm/green_papers/pdf/com96_721_en.pdf

⁵⁷ Gerber, D. J. (2007), *Two Forms of Modernization in European Competition Law*, p 1251, Fordham International Law Journal, Vol. 31, Issue 5, Art 8

⁵⁸ Hesselink, M. W. et al. (2006) *Principles of European Law: Commercial Agency, Franchise and Distribution Contracts*, p 91, Oxford, UK: Oxford University press

exclusivity is excluded. The crucial question shall be what the underlying agreement stipulates, which is to some extent, as explained later, in the parties' discretion.

For example, sometimes the parties form an agreement whereby the supplier supplies products to a sole distributor who sells these products in a territory specified in the agreement, whereas distribution in other territories is prohibited. This concept is known as territorial exclusivity.⁵⁹ Alternatively, the distributor agrees to sell products to a specified group of customers – known as exclusive customer allocation. The distributor usually agrees such terms given that these provide him protection from intra-brand competition in concrete segments of buyers.⁶⁰ Indeed, being the only one representing some brand in a certain territory or amongst a certain group of customers helps a lot to ensure a profitable business.

Furthermore, such protection may be indispensable when trying to enter into a new market. In addition, raising the number of competitors in turn enhances competition.⁶¹ However, in order to receive such a benefit, the distributor is usually forced to agree to purchase only from that supplier (i.e. exclusive purchasing) or at least not to represent the competing products. There are also selective distribution contracts where the supplier selects its distributors based on qualitative or quantitative criteria. The reason for the supplier for setting out such criteria is to maintain a profound image of its products through competent and professional distributors. Needless to say, there are also types of contracts which are mixtures of all the above mentioned.⁶²

Deriving from the aforesaid, there are various so called 'restrictions' that the parties may have to agree upon in a contract in order to receive certain benefits under the agreement. Those are commonly the non-competition and exclusivity clauses, as mentioned before. Other examples are price maintenance clauses where the distributor is restricted to sell the products within a certain price level determined by the supplier⁶³

⁵⁹ Mendelsohn, M. & Rose, S. (2002), *International Competition Law Series: Guide to the EC Block Exemption for Vertical Agreements*, vol. 4, p 18, Hague, the Netherlands: Kluwer Law International

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Hesselink, M. W. et al. (2006) *Principles of European Law: Commercial Agency, Franchise and Distribution Contracts*, p 261, Oxford, UK: Oxford University press

⁶³ Hesselink, M. W. et al. (2006) *Principles of European Law: Commercial Agency, Franchise and Distribution Contracts*, p 270, Oxford, UK: Oxford University press

and, for the purposes of this paper, the loyalty discounts. Namely, loyalty discounts that are given to the distributor when purchasing the supplier's products are considered 'restrictions' inasmuch as in practice, to receive a favourable price, the distributor is obliged to buy all or most of his demand from a sole supplier and that indirectly restricts him from purchasing products from other suppliers. If the distributor does not buy the amount of products as specified by the supplier, the price may end up considerably higher than for others who *are* loyal to that supplier. Consequently, the distributor may end up being attached to that supplier. Having said that, it may be concluded that the reason for offering such loyalty discounts is to either bind the distributor with the supplier or introduce a *de facto* exclusivity^{64, 65}. Further examples are restriction on the distributor to run sales campaigns or promotions outside the agreed territory or even restrictions regards purposes for which the products may be sold.⁶⁶

However, all of the abovementioned clauses (i.e. 'restrictions') in distribution agreements have been more or less held to infringe the EU competition law with certain exceptions derived from legislation or court practice. These are explained further on.

3.2. Agency agreements

Agency agreements are vertical agreements, which are made between an agent and a principal. Whether the agreement really constitutes as an agency agreement under the EU law depends on what role the agent has and how much commercial or financial risk it assumes in the transactions.⁶⁷ As to the role, an agent is somebody who can negotiate the terms of a contract as well as conclude these on the name of the principal in order

⁶⁴ Case 85/76, *Hoffmann-La Roche & Co. AG v Commission of the European Communities* [1979] ECR 461, p 546, retrieved from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61976CJ0085:EN:PDF>

⁶⁵ Hesselink, M. W. et al. (2006) *Principles of European Law: Commercial Agency, Franchise and Distribution Contracts*, p 262, Oxford, UK: Oxford University press

⁶⁶ Mendelsohn, M. & Rose, S. (2002) *International Competition Law Series: Guide to the EC Block Exemption for Vertical Agreements*, vol. 4, p 116, Hague, the Netherlands: Kluwer Law International

⁶⁷ Wijckmans, F. and Tuytschaever, F. (2011) *Vertical Agreements in EU Competition Law*, p 217, Oxford, UK: Oxford University Press

to sell or purchase goods or services for the principal.⁶⁸ Agency agreements play a significant part in the distribution chain in the EU. In practice, it is very common that an agent does the marketing of the product and has very little liability for the goods or services that were sold. Payment for work comes usually as a commission calculated according to agent's sales. Compared to the distribution contracts explained above, the supplier has much more control over the sale of goods or services at issue.⁶⁹

Generally, it can be said that the EU is rather liberal towards agency agreements. The reason for this is that the agent is considered only as a supplementary part of the principal's activities because their relationship demands much closer economic ties than a distribution relationship.⁷⁰ Similarly to distribution agreements, agency contracts often also have various limitations set out in the contract. Again, very frequently seen provision is territorial exclusivity, which is explained under the distribution agreement paragraph. Another is customer allocation, where either the principal or agent is restricted to approach actively certain groups of customers. In addition, there are occasions where the principal sets down absolute customer restriction on an agent. There are also single branding provisions, which prevent an agent to work for other principals and of course, fixed prices and/or non-compete rules.⁷¹ According to 1962 Commission Notice on exclusive dealing contracts with commercial agents, the abovementioned provisions were not in violation with (what is now) Article 101 TFEU, provided that the agent did not have any commercial liability in the transactions. Such agency agreements were called as 'genuine'.⁷² However, what exactly is considered genuine and what not, was unclear until 2000 Vertical Guidelines (now replaced by 2010 Vertical Guidelines) which provided a clarification on the matter. Namely, if the agent carries significant risk neither in market-specific investments nor in the commercial contracts then it is most likely a genuine agency agreement and save for some exceptions, escapes the scrutiny of Article 101 TFEU.⁷³

⁶⁸ Mendelsohn, M. and Rose, S. (2002), *Guide to the EC Block Exemption for Vertical Agreements*, vol. 4, p 78, Hague, The Netherlands: Kluwer Law International

⁶⁹ Ibid.

⁷⁰ Ibid p. 77

⁷¹ Wijckmans, F. and Tuytschaever, F. (2011) *Vertical Agreements in EU Competition Law*, p 224-227, Oxford, UK: Oxford University Press

⁷² Lidgard, H.H. (2011), *Part I: Competition Classics. Material & cases on European Competition Law and Practice*, p 156, Lund, Sweden: Maria Magle Publishing

⁷³ Lidgard, H.H. (2011), *Part I: Competition Classics. Material & cases on European Competition Law and Practice*, p 156, Lund, Sweden: Maria Magle Publishing

3.3.Franchise agreements

Franchise agreement is also one form of distribution, and it includes transferring licences of intellectual property rights relating especially to trademarks or signs as well as expertise for the distribution and the use of services or goods. On top of these, the franchisor normally provides technical or commercial assistance to the franchisee. Transfer of the intellectual property rights is a fundamental part of a franchise.⁷⁴ In practice, it means that the franchisee sells products or services under the franchisor's already established business method and advertisement scheme.⁷⁵ Normally, the franchisor gets a payment (franchise fee) from the franchisee for using his business structure. This approach allows the franchisor to establish a uniform system in order to distribute its products.⁷⁶ Common examples of franchises are fast food restaurants, hairdressing salons and photocopy shops.⁷⁷ This agreement differs from selective distribution agreement because the movement of know-how is essential in this type of relationship.⁷⁸

In addition to the business method stipulation, franchise agreements also normally contain various vertical restraints related to the products that are distributed. Frequent ones are clauses regarding territorial protection or restriction, meaning that sometimes the franchisor is by the agreement prohibited to employ other franchisees in a certain territory or run any marketing there. Exclusive purchasing and/or supply, where the franchisee is prohibited to buy products from other companies other than the franchisor or companies it as previously approved.⁷⁹ Common non-competition prohibition means that a franchisee cannot do any activities that compete with the franchisor. These include, for instance, the prohibition of creating a competitive side business or selling goods that compete with those of the franchisor. Such provisions can apply during the

⁷⁴ Commission notice: Guidelines on vertical restraints (2010) OJ C 130, retrieved from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:130:0001:0046:EN:PDF>

⁷⁵ Ritter, L. and Braun W.D. (2005) *European Competition Law: A Practitioner's Guide*, p 302, Hague, The Netherlands: Kluwer Law International

⁷⁶ Commission notice: Guidelines on vertical restraints (2010) OJ C 130, retrieved from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:130:0001:0046:EN:PDF>

⁷⁷ Goyder, J. (2005) *EU Distribution Law*, 4th ed, p 150, Oregon, USA: Hart Publishing

⁷⁸ Ritter, L. and Braun W.D. (2005) *European Competition Law: A Practitioner's Guide*, Hague, The Netherlands: Kluwer Law International

⁷⁹ Ritter, L. and Braun W.D. (2005) *European Competition Law: A Practitioner's Guide*, p 303, Hague, The Netherlands: Kluwer Law International

contract as well as after termination of it.⁸⁰ Frequent clauses are also quantity forcing (prescribing certain quantities of goods the franchisee must buy from the franchisor) and customer allocation or restriction (prescribing or prohibiting active sales to certain groups of customers).⁸¹

Aforesaid shows that all vertical agreements usually have some form of restrictions to the parties inset. These may be to protect the intermediary against supplier or against other intermediaries (i.e. competitors), or supplier against intermediary. In any case, the goal of these provisions is to assure parties so that they can both benefit from the agreement. A Nobel-Prize winning economist Milton Friedman has aptly pointed out in one of his interviews that ‘the most important single central fact about a free market is that no exchange takes place unless both parties benefit.’⁸² In this interview, he defends his argument that black markets are fair and beneficial since the parties are free to negotiate their terms of the deal, unlike in the conditions where state authorities have forced terms with the means of legislation. In the latter circumstance, he explains, it very well may happen that one party gets what he wants whereas the other loses.

EU, however, has taken the approach to regulate agreements and thus given the motive to write this research. Those regulations have, as explained in the introduction, objectives to protect the parties, competition or the consumers. These rules vary between different forms of agreements, as the obligations of the parties do. Next will be analyzed what rules the EU has set down regarding vertical agreements.

4. LIMITATIONS IN LEGISLATION

The primary legislation regulating vertical agreements is Article 101(1) of TFEU stating that any agreement, which may affect trade between Member States and may prevent, restrict or distort competition within the common market, is invalid. In particular, the Treaty mentions agreements that fix prices and share markets, which are

⁸⁰ Goyder, J. (2005) *EU Distribution Law*, 4th ed, pp 156-157, Oregon, USA: Hart Publishing

⁸¹ Wijckmans, F. and Tuytschaever, F. (2011) *Vertical Agreements in EU Competition Law*, pp 215-217, Oxford, UK: Oxford University Press

⁸² Friedman, M. (2000), interview, ‘*The Economic Logic Behind Black Markets*’, retrieved from http://www.pbs.org/wgbh/commandingheights/shared/minitext/int_miltonfriedman.html#2

still often seen as part of vertical agreements. Article 101(3), on the other hand, provides justifications for the agreements that have fallen under the scope of Article 101(1). Namely, all agreements that are beneficial for the economy and consumers, whereas not containing unnecessary restrictions on parties and without the possibility to eliminate competition in the relevant market, are excused according to Article 101(3) TFEU, even if *per se* running contrary to Article 101(1).⁸³

Treaty articles are general and often ambiguous in their wording and therefore the EU institutions have used their right, as provided for in Articles 103 and 288 of TFEU, to introduce secondary legislation, e.g., directives, regulations and guidelines. These help to bring the Treaty Articles into force in Member States and provide interpretations, specifications, exceptions, etc. necessary to ensure a uniform application of the EU competition rules. Some have as their object a consumer protection whereas the others are to regulate relations between contractors.⁸⁴ As of now, there are four pieces of secondary legislation in EU made precisely to regulate competition in the area of vertical agreements. These are the 2001 Notice on agreements of minor importance (*de minimis* Notice), 2010 Regulation 330/2010 on Vertical Agreements⁸⁵, 2010 Commission's Guidelines on Vertical Restraints and the 1986 Directive 653 on self-employed commercial agents.⁸⁶ The author will look at each of these and see what limitations have been set to the possible restrictions in vertical agreements by these documents.

4.1. 2001 Notice on agreements of minor importance (*de minimis* Notice)

De minimis doctrine was presented by the Commission in order to reduce the uncertainty around the issue of which agreements can escape the prohibitions laid

⁸³Consolidated Version of the Treaty on the Functioning of the European Union (2010) OJ C 83, retrieved from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0047:0200:en:PDF>

⁸⁴Goyder, J. (2005) *EU Distribution Law*, 4th ed, p 16, Oregon, USA: Hart Publishing

⁸⁵ Commission Regulation (EU) No 330/2010 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 (2010) OJ L 102, retrieved from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:102:0001:0007:EN:PDF>

⁸⁶ Council Directive 86/653/EEC on the coordination of the laws of the Member States relating to self-employed commercial agents (1986) OJ L 382, received from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1986:382:0017:0021:EN:PDF>

down in Article 101 TFEU. This Notice gives the undertakings relatively free hands to form their agreements if the market shares between competitors do not exceed 10% and non-competitors 15%. It is said ‘relatively’ free hands because according to the Notice, whatever the market share is, independent economic parties should still never use hard-core restraints such as price fixing and territorial protection if they want to be sure to be in line with effective competition.⁸⁷ The main reason to excuse agreements between companies that have very small market shares is that these are not considered to affect the internal market. However, going as bold as fixing the prices or allocation of markets or customers are generally deemed to restrict competition ‘by their very nature’⁸⁸ and may end up causing a fine and annulment of those clauses from the contract. Nevertheless, it is necessary to keep in mind that this, or in fact any other Commission’s Notice, are actually not binding. Its purpose is only to contain some explanation how the Commission makes its decisions when weighing whether some agreement abides EU competition rules or not⁸⁹.

4.2. Regulation 330/2010 on Vertical Agreements

The most important piece of secondary legislation in this field is the Regulation on Vertical Agreements, also called as the ‘block exemption regulation’. In principle, it excuses all agreements with vertical restrictions if the parties’ total annual turnover does not exceed EUR 50 million and the market shares stay under 30% limit of the relevant market. It shows that the Commission does not want to intervene in small firms’ economical activities since such entities are probably not able to hurt the competition on the Union level. Similarly to the Notice, however, it states that in case of hard-core restrictions this Regulation does not excuse the agreement, whatever the turnover and market shares are, and throws it back under the full scope of Article 101 of TFEU. In that way, the Commission has shown its limits in which it tolerates

⁸⁷ Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (2001) OJ C 368, retrieved from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2001:368:0013:0015:EN:PDF>

⁸⁸Korah, V. and O’Sullivan, D.(2002) *Distribution Agreements Under the EC Competition Rules*, p 69, Oregon, USA: Hart Publishing

⁸⁹ Ibid. p 70

restrictions in vertical agreements and seems to show its incentive to protect the consumers in case of grave violations.

As to price fixing, it condemns the restriction on distributor to set its own sale price but it nevertheless allows the supplier to set a maximum or recommended sale price of the product.⁹⁰ Such provision seems to be made in order to protect primarily the consumers. In agency agreements, on the other hand, fixing prices is generally allowed because the agent and principal are considered to form one single business for the purposes of EU competition law. The Guidelines⁹¹ explain that only in case if the agent is an independent intermediary, it must have the right to lower the cost from the recommended price by sharing some or all of its commission with the consumer. If an independent agent is not allowed to do that then it constitutes a hard-core restriction in the meaning of Article 4(a) of Vertical Regulation and loses the benefit of this block exemption.⁹² Here it appears that the Commission has given free hands to do their business but intervenes as far as it is possible to offer consumers greater benefits. Nevertheless, it has left it up to the agent, i.e. an economic entity, to decide that.

With some exceptions, the Regulation also disapproves restrictions regarding territory where the distributor is allowed to sell products. That however shows that the Commission is not prohibiting exclusive territorial rights *per se*.⁹³ Such concession supports the argument that the Commission is not over-regulating and while protecting the competition and consumers, it understands the good impact of some types of vertical agreements to economic efficiency. For instance, restrictions in franchising agreements are generally allowed because they are assumed to fall under the criteria of Article 2(3) of Vertical Regulation,⁹⁴ which in essence exempts restrictions that relate to the transfer of intellectual property rights. The Commission therefore does not

⁹⁰Commission Regulation (EU) No 330/2010 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, OJ L 102, retrieved from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:102:0001:0007:EN:PDF>

⁹¹ Commission's Guidelines on vertical restraints (2010) OJ C 130, retrieved from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:130:0001:0046:EN:PDF>

⁹² Wijckmans, F. and Tuytschaever, F. (2011) *Vertical Agreements in EU Competition Law*, p 225, Oxford, UK: Oxford University Press

⁹³ Mendelsohn, M. and Rose, S. (2002) *International Competition Law Series: Guide to the EC Block Exemption for Vertical Agreements*, vol 4, pp 55-56, Hague, the Netherlands: Kluwer Law International

⁹⁴ Wijckmans, F. and Tuytschaever, F. (2011) *Vertical Agreements in EU Competition Law*, p 214, Oxford, UK: Oxford University Press

intervene as long as the parties are merely trying to protect their business secrets. The permissibility of some other provisions occurring in franchise agreements depends whether that particular franchise agreement is founded on selective or non-selective *modus operandi*. This means whether the franchisee is allowed or not to sell products to unauthorized distributors. In case of selectivity, selective distribution rules apply. In case of non-selective method, exclusive or non-exclusive distribution rules apply.⁹⁵

In selective distribution agreements, the Commission has limited the scope of the block exemption to agreements, which do not restrict retailers' right to sell products to end users and agreements that do not restrict cross-supplies between distributors. However, agreements including provisions that restrict the manufacturer to supply its products to end users are considered not to find a protection from the block exemption regulation.⁹⁶

Regards non-compete clauses in vertical agreements; the Commission has taken a more relaxed view in that it allows such clauses to exist for five years. Should it be inserted or left in the agreement for a longer period than that, it can simply be ordered to be taken out of it whereas the rest could still stay under the scope of block exception Regulation.

The same goes to restrictions on the distributor to purchase, manufacture, sell or resell goods or services after termination of the agreement. However, such a restriction can only be applied for one year and only regards competing products with the contract goods on the same premises as during the contract and only when it is necessary to protect the knowledge given from the supplier to distributor. All four of these conditions have to be met in order to be in accordance with the block exemption⁹⁷. For example, these conditions are often met in franchise agreements.⁹⁸

It shows that the Commission is not categorically condemning all non-compete clauses in agreements but is having rather flexible view in this respect. It allows, in principle,

⁹⁵ Wijckmans, F. and Tuytschaever, F. (2011) *Vertical Agreements in EU Competition Law*, p 215, Oxford, UK: Oxford University Press

⁹⁶ Mendelsohn, M. and Rose, S. (2002) *International Competition Law Series: Guide to the EC Block Exemption for Vertical Agreements*, vol 4, p 58, Hague, the Netherlands: Kluwer Law International

⁹⁷ Ibid. p 61

⁹⁸ Wijckmans, F. and Tuytschaever, F. (2011) *Vertical Agreements in EU Competition Law*, p 216, Oxford, UK: Oxford University Press

the parties to restrict each other, but it has set certain limits and rules on these restrictions in order to protect the parties themselves and ultimately, the consumers.

4.3. 2010 Commission's Guidelines on Vertical Restraints

Vertical Guidelines is a non-binding document accompanying Regulation on vertical agreements. Its purpose is to clarify on what conditions the Regulation is applied exactly, wherein it provides explicit principles how to define the relevant market as well as how to calculate market shares. It also sheds some light on the question how the Commission analyses the facts of the cases before it and defines more thoroughly those vertical agreements that do not fall under scrutiny of Article 101 of TFEU.⁹⁹ These Guidelines, like the Notice, are simply to provide detailed explanations, which allow undertakings to better understand EU legislation and act in accordance to it. Accordingly, the principle of legal certainty seems to be satisfied.

Vertical Guidelines come in especially handy when it is necessary to assess whether certain provisions in agency agreements fall under the scope of Article 101 TFEU. For instance, it clarifies that single branding, exclusive purchasing as well as post-term non-competition provisions do fall under Article 101 TFEU, no matter whether the agent is independent or not. If these provisions play a part in creating restrictive effects on entering into market, they may infringe Article 101.¹⁰⁰

On the one hand, it indicates that the Commission is leaving too little economic freedom to the parties. It is willing to enter into an economic relationship and regulate it even if the parties to an agreement are not independent bodies, keeping an eye on the fact that the agent is normally considered to form a part of the principal.¹⁰¹ On the other hand, the objective here is to protect the smooth entering into market, and in

⁹⁹ European Commission's Guidelines on Vertical Restraints (2010), OJ C 130, retrieved from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:130:0001:0046:EN:PDF>

¹⁰⁰ Wijckmans, F. and Tuytschaever, F. (2011) *Vertical Agreements in EU Competition Law*, p 226, Oxford, UK: Oxford University Press

¹⁰¹ Lidgard, H.H. (2011) *Part I: Competition Classics. Material & cases on European Competition Law and Practice*, p 155, Lund, Sweden: Maria Magle Publishing

effect economical freedom, instead of consumer protection. That, however, is in accordance with the principles of the initial objectives of the EU.

As to franchising, the Guidelines indicate that the agreement has to be categorized as either exclusive, non-exclusive, selective or non-selective, and assessed accordingly under the Regulation.¹⁰²

4.4. 1986 Directive 653 on self-employed commercial agents

This Directive defines the idea of self-employed commercial agents and provides some insight what are the obligations and rights of the parties to an agency agreement. The aim of this Directive was to protect the agents' freedom of establishment,¹⁰³ which conforms to the views of ordoliberalians.

For one intervention into vertical agreements, it can be brought out that Article 20 renders invalid all restraints that last after the agency agreement has ended, unless they last less than two years and apply only to the customers, areas or goods that were covered by the contract. However, this is a minimum requirement and the Member States can always make their laws stricter on that matter.¹⁰⁴

Based on the above it can be argued that in general, the Commission has regulated the area of vertical agreements rather thoroughly but nevertheless so that providing the parties to an agreement flexibility to agree on certain restrictions without harming each other, competition or consumers. Furthermore, the Commission has brought out certain vertical agreements, such as agency and subcontracting agreements, which generally do not fall under Article 101 TFEU.¹⁰⁵

¹⁰² Wijckmans, F. and Tuytschaever, F. (2011) *Vertical Agreements in EU Competition Law*, p 217, Oxford, UK: Oxford University Press

¹⁰³ Lidgard, H.H. (2011) *Part I: Competition Classics. Material & cases on European Competition Law and Practice*, p 155, Lund, Sweden: Maria Magle Publishing

¹⁰⁴ Council Directive 86/653/EEC on the coordination of the laws of the Member States relating to self-employed commercial agents (1986), OJ L 382, retrieved from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1986:382:0017:0021:EN:PDF>

¹⁰⁵ European Commission's Guidelines on Vertical Restraints (2010), OJ C 130, retrieved from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:130:0001:0046:EN:PDF>

Next step in the analysis is to look at how these rules have been applied in real life situations, i.e. how the case law has employed those rules.

5. LIMITATIONS IN CASE LAW – INTERPRETATION OF LEGISLATION

Firstly, it is important to know that the limits on agreements set out in the Treaty itself are directly applicable. As early as in *Bosch*¹⁰⁶ case CJEU introduced a rule that Article (which is now) 101 in TFEU is directly applicable and ready to be relied upon in a national court by one undertaking against another. In the light of the aforesaid ruling, those limits are not some vague rules but very concrete and obligatory. However, to avoid legal consequences for unlawful restrictions set out in the Treaty, there is a possibility to be ‘excused’, either individually or by a category. Since 1962, the Commission had sole right to grant such exemptions but this monopoly was eliminated with the modernization of competition rules in 2004.¹⁰⁷ Since then, the view on unlawful agreements have loosened somewhat and the consumer welfare started to be increasingly important. In general, it can be said that CJEU has been more hesitant than the Commission to rule that distribution agreements are anti-competitive.¹⁰⁸

As to agency agreements, on the other hand, it seems that the Court is slowly becoming more restrictive.¹⁰⁹ In 1966, it ruled in *Consten and Grundig* that agency agreements do not fall under (what is now) Article 101(1) of TFEU. It confirmed this idea in *Sugar* case, maintaining that because the agent is not an independent body but rather considered as part of the principal, then even a non-compete restriction in the agreement does not fall under Article 101. In *Volkswagen*, however, the court assessed whether the agent carries any risks in the transactions and found that if so then the agent is on the same footing with independent distributors.¹¹⁰ In these circumstances,

¹⁰⁶ Case C-13/61 *Kledingverkoopbedrijf de Geus en Uitdenbogerd v Robert Bosch GmbH and Maatschappij tot voortzetting van de zaken der Firma Willem van Rijn* [1962], ECR 45, [1962] CMLR 1

¹⁰⁷ Jones, A. (2010), ‘Left Behind by Modernisation - Restrictions by Object under Article 101(1)’, p 650, *European Competition Journal*, Vol. 6, No 3, December 2010, pp. 649-676

¹⁰⁸ Lidgard, H.H. (2011), *Part I: Competition Classics. Material & cases on European Competition Law and Practice*, p 17, Lund, Sweden: Maria Magle Publishing

¹⁰⁹ *Ibid.* p 155

¹¹⁰ Case C-266/93 *Bundeskartellamt v Volkswagen AG and VAG Leasing*, [1995] ECR I-3477

the restrictive clauses even in an agency agreement may fall under Article 101 of TFEU¹¹¹.¹¹² Furthermore, the Court ruled that agency agreements, which end up restricting competition between agents, might also come under scrutiny of Article 101 of TFEU.¹¹³

In general, there are four different types of analyses in EU competition infringement. One is looking at the objective of the agreement and whether it is expected to infringe Article 101 of TFEU. In *Miller* case, the CJEU held that proof of the actual impact on trade is not necessary, if it was capable of having potential or indirect effects on trade.¹¹⁴ Second type of analysis is to look directly at the effect of the agreement. If it is claimed to restrict competition then it is up to defendant to prove that the restriction is justified under 101(3) of TFEU. In addition, there are agreements that fall under the abovementioned block exemption Regulation. The Regulation has rather stringent conditions but if these are met, the agreement is considered to be in a so-called ‘safe harbour’ and is exempted from the scrutiny of Art 101(1) of TFEU. And finally, there is a form of analysis to see if the agreements are simply insignificant, that is, their effect on competition is too small to take into account.¹¹⁵ Before the Commission issued *de minimis* Notice, the CJEU had already found in *Völk v Vervaecke* that even if there is an absolute territorial protection but it does not affect trade or restrict competition then it does not fall under Article 101(1).¹¹⁶

Likewise to the ‘hardcore restrictions’ in Commission’s legislation, the case law has shown that some restraints in agreements have an objective to restrict competition and are thus unlawful, regardless of their actual effect at that time.

¹¹¹ Lidgard, H.H. (2011), *Part I: Competition Classics. Material & cases on European Competition Law and Practice*, p 157, Lund, Sweden: Maria Magle Publishing

¹¹² Case C-217/05 *Confederación Española de. Empresarios de Estaciones de Servicio v CEPSA* [2006] ECR I-11987

¹¹³ Case 311/85 *ASBL Vereniging van Vlaamse Reisbureaus v. ASBL Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten* [1987] ECR 3801

¹¹⁴ Case C-19/77 *Miller International Schallplatten GmbH v Commission of the European Communities*, [1978] ECR 131

¹¹⁵ Jones, A. (2010) ‘*Left Behind by Modernisation - Restrictions by Object under Article 101(1)*’, p 655, *European Competition Journal*, Vol. 6, No 3, December 2010 , pp 649-676

¹¹⁶ Case C-5/69 *Franz Völk v Établissements J. Vervaecke* [1969], ECR 295, para. 3

In *European Night Services* it was clearly held that agreements to fix prices between competitors, share markets or limit output were unlawful.¹¹⁷ However, vertical agreements are seen less harmful than horizontal ones in that respect, as the parties operate on different levels and usually do not compete with each other. Nevertheless, this ruling applies just as well to vertical agreements, should the parties be competing in some areas.¹¹⁸

Vertical agreements that include clauses, which impose fixed or minimum resale prices on a distributor (resale price maintenance) was held to be a grave violation of competition laws by a preliminary ruling in *SA Binon & Cie*.¹¹⁹ This was also held to infringe competition laws by the Commission in *Deutsche Philips* case, and consequently resulted in a fine.¹²⁰ However, the supplier in a vertical relationship is allowed to set a maximum or recommended sale price of the product. In any case, going beyond than just recommending minimum price is taken as a weighty breach of competition.¹²¹

Vertical restrictions that bring about exclusive sales territory and/or protection from sales by others within that territory or which otherwise restrict parallel trade was also condemned in *GlaxoSmithKline*.¹²² Export bans, which prohibit a distributor from exporting the product outside a designated area were in the 70ies said to be judged particularly severely, as was any other attempt to establish absolute territorial protection for a distributor.¹²³ However, ten years later the CJEU ruled that in certain circumstances, where absolute territorial protection is necessary for the success of a distribution system, such restriction might fall out of Article 101(1) of TFEU.¹²⁴

¹¹⁷Joined cases T-374, 375, 384 and 388/94 *European Night Services v Commission* [1998] ECR II-3141, para. 136

¹¹⁸Commission Regulation (EU) No 330/2010 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 (2010) Art. 2(4), OJ L 102, retrieved from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:102:0001:0007:EN:PDF>

¹¹⁹Case C-234/83 *SA Binon & Cie v SA Agence et Messageries de la Presse* [1985] ECR 2015, para. 44

¹²⁰Commission decision 73/322/EEC *Deutsche Philips GmbH* [1973] OJ L 293/40, case IV/27.010

¹²¹Commission decision 87/14/EEC *Yves Rocher* [1987] OJ L8/49, case IV/31.428 to 31.432

¹²²Joined cases C-501/06 P, etc. *GlaxoSmithKline Services Unlimited and others v Commission of the European Communities* [2009], para. 59, retrieved from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62006J0501:EN:HTML>

¹²³Case C-19/77 *Miller International Schallplatten GmbH v Commission of the European Communities*, [1978] ECR 131

¹²⁴Case C-27/87 *Erauw-Jacquéry v La Hesbignonne* [1988] ECR 1919

Although, in *Pronuptia* it ruled that a franchise agreement creating territorial exclusivity was covered by Article 101 of TFEU but also that it could be exempted under Article 101(3).¹²⁵

Generally, it appears that both the Court and Commission are prone to allow territorial exclusivity in franchise agreements because it is seen as very beneficial for small companies.¹²⁶

Sometimes it is not evident from the objective of the exclusive distribution agreement whether it has as its object to restrict competition. In that case, the courts look at the effects of it. That requires a market analysis: to see the agreement in its legal, factual and economic context.¹²⁷ CJEU used the same line of analysis in *Delimitis*, regarding an exclusive purchasing agreement.¹²⁸ Generally, the case law shows that if an exclusive supply contract helps to penetrate some market then it is to be encouraged.¹²⁹

As to selective distribution agreements, both the CJEU and Commission agree that if the distributors are chosen uniformly and non-discriminatorily by an objective qualitative criterion based on technical qualifications of the distributor and the suitability of his trading premises then it escapes the application of Article 101(1).¹³⁰ In addition, goods where brand image is important¹³¹ or products that require specialist staff can justify selective distribution agreements.¹³² However, the limit of this compromise is where such selective distribution agreement starts to eliminate competition¹³³ or award absolute territorial protection.¹³⁴ Commission's flexibility is apparent when it approved *B&W Loudspeakers'* selective distribution agreement, if the company removed its hard-core restrictions from it.¹³⁵ Similarly, the Commission accepted the agreement of *Yves Saint Laurent*, subject to letting its distributors to sell

¹²⁵ Case 161/84 *Pronuptia de Paris GmbH v. Pronuptia de Paris Irmgard Schillgalis*, para. 24, [1986] ECR 353

¹²⁶ Goyder, J. (2005) *EU Distribution Law*, 4th ed. p. 153, Oregon, USA: Hart Publishing

¹²⁷ Case C-23/67 *Brasserie De Haecht v Wilkin* [1967] ECR 407

¹²⁸ Case C-234/89, *Stergios Delimitis v Henninger Brau* [1991] ECR I-935

¹²⁹ Case C-56/65 *Societe Technique Miniere v Maschinenbau Ulm GmbH* [1966] ECR 235

¹³⁰ Case C-26/76 *Metro SB-Grossmarkte GmbH v Commission* [1977] ECR 1875

¹³¹ Commission decision 85/616/EEC *Villeroy&Boch* [1985] OJ L 376/15, case IV/30.665

¹³² Commission decision 84/233/EEC *IBM personal computers* [1984] OJ L 118, case IV/30.849

¹³³ Case C-75/84 *Metro v Commission II* [1986] ECR 3021

¹³⁴ Case C-70/93 *Bayerische Motorenwerke AG v. ALD Auto-Leasing D GmbH* [1995] ECR 3439

¹³⁵ Commission decision 37709 - *B&W Loudspeakers* 24.06.2002

perfumes and other luxury items in Internet.¹³⁶ In *Yves Rocher*¹³⁷ and *Computerland*¹³⁸ decisions, the Commission approved a selective franchise system because understood that only this way the franchisor could maintain its reputation.

6. CONCLUSION

When EU predecessor ECSC was created in 1951, the founding fathers had in mind to regulate competition in order to encourage market integration and protect economic freedom. According to many academics, and as apparent from the legislation and case law, the EU has changed its competition enforcement policies in the course of time. It is pointed out that the objective of protecting economic freedom has largely switched to the protection of consumers. Whether this changed objective has led to over-regulation of the area of vertical agreements, and by limiting the freedom of contractors in those agreements, has the EU eventually run contrary to the principle of the founding fathers' view on regulating the market economy was the basis of this paper. Taking into consideration all of the above mentioned, the author is inclined to believe that this is not the case.

Although EU started with the ordoliberal objective of regulating competition to protect economic freedom, it has had a lot of influence from the US on that matter. One could see from the case law that up until the 1980ties, EU had a rather strict approach when assessing whether certain conducts are anti-competitive or not. At the same time across the ocean, the Harvard school of thought had its highest peak, which was noticeable by an extremely interventionist era in US. However, when more liberal Chicago and post-Chicago schools replaced the Harvard way of thinking, seeing the objective of competition to ensure effectiveness, the EU appeared to have gradually changed its policy as well. For example, attempts to establish absolute territorial protection for a distributor were in the 1970ies judged particularly severely, as exemplified in *Miller International Schallplatten*. However, in 1984 the CJEU ruled in *Pronuptia* that where absolute territorial protection is necessary for the success of a distribution system, such restriction *could* be justified under Article 101(3) of TFEU and in *Erauw-Jacquéry* that

¹³⁶ Commission decision 36533 - *Yves Saint Laurent* 17.05.2001

¹³⁷ Commission decision 87/14/EEC *Yves Rocher* [1987] OJ L8/49, case IV/31.428 to 31.432

¹³⁸ Commission decision 87/407/EEC *Computerland* [1987] OJ L222/12, case IV/32.034

they may even fall out of 101 TFEU. Indeed, after the modernization it was clear that EU has added a new objective regarding competition policy, which is consumer protection.

While consumer protection may raise suspicions especially from entrepreneurs whether their economic freedoms will be restricted, it is interesting to notice that EU competition policy has actually liberalized. The Commission understands that vertical agreements may have positive effects and has also stipulated these in the 2010 Vertical Guidelines. Luckily, together with the modernization of EU competition procedures the Commission also ‘modernized’ its formalistic approach to a more effects-based approach regarding competition enforcement. This in turn helps to excuse many vertical restraints, which in essence do not have damaging effect on competition but would earlier be prohibited simply by their form. For instance, shift in attitude was in addition to the abovementioned seen also in 1987 in the Commission’s *Yves Rocher* and *Computerland* decisions where it approved selective franchise systems because it understood that only this way the franchisor could maintain its reputation.

Overall, it can be seen from the case law on vertical agreements that the Courts’ and Commission’s formalistic and strict approach is shifting towards an economic-based approach. It seems that as time goes by, the Courts and Commission become more flexible and do not rule all restrictions absolutely unlawful but analyse these in their economic and legal context, and offer parties to remove hard-core restrictions or otherwise alter their agreement so that it would eventually be in line with EU competition rules. However, this shows that as regards to vertical agreements, the EU has not overly regulated our freedom of contracting and therefore has not run contrary to the competition principles of the ‘founding fathers’, but instead just added another one – the consumer protection.

LIST OF REFERECES

Books and Independent Publications

1. Akman, P. (2012) *The Concept of abuse in EU competition law - Law and economic approaches*, Oxford, UK: Hart Publishing Ltd.
2. Baumol, W. J. (2002), *The Free Market Innovation Machine: Analyzing the Growth Miracle of Capitalism*, New Jersey, USA: Princeton University Press
3. Cseres, K. J. (2005) *Competition Law and Consumer Protection*, Hague, The Netherlands: Kluwer Law International
4. Gillespie, A. (2011) *Foundations of Economics*, Oxford, UK: Oxford University Press
5. Goyder, J. (2005) *EU Distribution Law*, 4th ed, Oregon, USA: Hart Publishing
6. Hesselink, M. W. et al. (2006) *Principles of European Law: Commercial Agency, Franchise and Distribution Contracts*, Oxford, UK: Oxford University press
7. Jones, A. and Sufrin, B. (2008) *EC Competition Law*, 3rd ed, Oxford, UK: Oxford University Press
8. Kates, S. (2011) *Free Market Economics: An Introduction for the General Reader*, Glos, UK: Edward Elgar Publishing Limited
9. Korah, V. and O'Sullivan, D.(2002) *Distribution Agreements Under the EC Competition Rules*, Oregon, USA: Hart Publishing
10. Lidgard, H.H. (2011), *Part I: Competition Classics. Material & cases on European Competition Law and Practice*, Lund, Sweden: Maria Magle Publishing
11. Mendelsohn, M. & Rose, S. (2002), *International Competition Law Series: Guide to the EC Block Exemption for Vertical Agreements*, vol. 4, Hague, the Netherlands: Kluwer Law International
12. Motta, M. (2004) *Competition Policy: Theory and Practice*, Cambridge, UK: Cambridge University Press
13. Ritter, L. and Braun W.D. (2005) *European Competition Law: A Practitioner's Guide*, Hague, The Netherlands: Kluwer Law International

14. Vasigh, B. et al. (2008) *Introduction to Air Transport Economics: From Theory to Applications*, Hampshire, UK: Ashgate Publishing Ltd, citing Milton Friedeman
15. Wijckmans, F. and Tuytschaever, F. (2011) *Vertical Agreements in EU Competition Law*, Oxford, UK: Oxford University Press

Articles

16. Albi, A. (2008), '*Eesti õigusteadus, globaliseeruv maailm ja äärmusliberaalne majandusideoloogia*', *Juridica*, Vol. VII, 2008, pp. 443-461, ISSN 1406-5495
17. Baarsma, B. E. (2011) '*Rewriting European Competition Law from an Economic Perspective*', *European Competition Journal*, Vol. 7, No 3, pp 559-585
18. Crane, D. A. (2008) *Chicago, Post-Chicago, and Neo-Chicago*, a review of *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust* edited by Robert Pitofsky (2008) Pp xiv, 309, *The University of Chicago Law Review*, Vol. 76, Issue 4, Fall 2009
19. Gerber, D. J. (2007), *Two Forms of Modernization in European Competition Law*, *Fordham International Law Journal*, Vol. 31, Issue 5, Art 8
20. Parret, L. (2010), '*Shouldn't We Know What We are Protecting - Yes We Should - A Plea for a Solid and Comprehensive Debate about the Objectives of EU Competition Law and Policy*', *European Competition Journal*, Vol. 6, No 2, August 2010, pp 339-376
21. Rahn, R. W. (2011) '*Estonia's Free-Market Principles Prevailing*', *Newsmax*, retrieved from <http://www.newsmax.com/Rahn/estonia-freemarket-economy/2011/06/21/id/400766>

Other sources

22. European Commission's Green Paper on Vertical Restraints (1997), retrieved from http://europa.eu/documents/comm/green_papers/pdf/com96_721_en.pdf
23. European Commission's Guidelines on Vertical Restraints (2010), OJ C 130, retrieved from <http://eur->

lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:130:0001:0046:EN:PDF

24. European Commission's Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (2001) OJ C 368, retrieved from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2001:368:0013:0015:EN:PDF>
25. European Commission's White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty (1999) Commission programme No 99/027, COM(1999) 101, retrieved from http://europa.eu/documents/comm/white_papers/pdf/com99_101_en.pdf
26. Friedman, M. (2000), interview, '*The Economic Logic Behind Black Markets*', retrieved from http://www.pbs.org/wgbh/commandingheights/shared/minitext/int_miltonfriedman.html#2

Table of cases

27. Case 161/84 *Pronuptia de Paris GmbH v. Pronuptia de Paris Irmgard Schillgallis* [1986] ECR 353
28. Case 311/85 *ASBL Vereniging van Vlaamse Reisbureaus v. ASBL Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten* [1987] ECR 3801
29. Case 85/76, *Hoffmann-La Roche & Co. AG v Commission of the European Communities* [1979] ECR 461, retrieved from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61976CJ0085:EN:PDF>
30. Case C-126/97, *Eco Swiss China Time Ltd, v Benetton International BV* [1999] ECR I-3055
31. Case C-13/61 *Kledingverkoopbedrijf de Geus en Uitdenbogerd v Robert Bosch GmbH and Maatschappij tot voortzetting van de zaken der Firma Willem van Rijn* [1962], ECR 45, [1962] CMLR 1

32. Case C-19/77 *Miller International Schallplatten GmbH v Commission of the European Communities* [1978] ECR 131
33. Case C-217/05 *Confederación Espanola de. Empresarios de Estaciones de Servicio v CEPSA* [2006] ECR I-11987
34. Case C-23/67 *Brasserie De Haecht v Wilkin* [1967] ECR 407
35. Case C-234/83 *SA Binon&Cie v SA Agence et Messageries de la Presse* [1985] ECR 2015
36. Case C-234/89 *StergiosDelimitis v HenningerBraü* [1991] ECR I-935
37. Case C-26/76 *Metro SB-Grossmarkte GmbH v Commission* [1977] ECR 1875
38. Case C-266/93 *Bundeskartellamt v Volkswagen AG and VAG Leasing*, [1995] ECR I-3477
39. Case C-27/87 *Erauw-Jacquéry v La Hesbignonne* [1988] ECR 1919
40. Case C-5/69 *Franz Völk v Établissements J. Vervaecke* [1969] ECR 295
41. Case C-56/65 *Societe Technique Miniere v Maschinenbau Ulm GmbH* [1966] ECR 235
42. Case C-70/93 *BayerischeMotorenwerke AG v. ALD Auto-Leasing D GmbH* [1995] ECR 3439
43. Case C-75/84 *Metro v Commission II* [1986] ECR 3021
44. Commission decision 36533 - *Yves Saint Laurent* [2001]
45. Commission decision 37709 - *B&W Loudspeakers* [2002]
46. Commission decision 73/322/EEC *Deutsche Philips GmbH* [1973] OJ L 293/40, case IV/27.010
47. Commission decision 84/233/EEC *IBM personal computers* [1984] OJ L 118, case IV/30.849
48. Commission decision 85/616/EEC *Villeroy&Boch* [1985] OJ L 376/15, case IV/30.665
49. Commission decision 87/14/EEC *Yves Rocher* [1987] OJ L8/49, case IV/31.428 to 31.432
50. Commission decision 87/407/EEC *Computerland* [1987] OJ L222/12, case IV/32.034
51. Joined cases C-501/06 P, etc. *GlaxoSmithKline Services Unlimited and others v Commission of the European Communities* [2009], retrieved from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62006J0501:EN:HTML>

52. Joined cases T-374, 375, 384 and 388/94 *European Night Services v Commission* [1998] ECR II-3141
53. U.S. Sup Ct, *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 [1911], retrieved from <http://supreme.justia.com/cases/federal/us/220/373/case.html>

Table of legislative acts

54. 15 U.S.C. § 1, retrieved from <http://www.law.cornell.edu/uscode/text/15/1>
55. Commission Regulation No 330/2010 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 (2010) OJ L 102, retrieved from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:102:0001:0007:EN:PDF>
56. Consolidated Version of the Treaty on the Functioning of the European Union (2010) OJ C 83, retrieved from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0047:0200:en:PDF>
57. Council Directive 86/653/EEC on the coordination of the laws of the Member States relating to self-employed commercial agents (1986) OJ L 382, retrieved from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1986:382:0017:0021:EN:PDF>
58. Council Regulation No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (2002) OJ L 1, retrieved from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:001:0001:0025:EN:PDF>
59. Treaty Establishing the European Coal and Steel Community (1951), retrieved from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:11951K:EN:PDF>