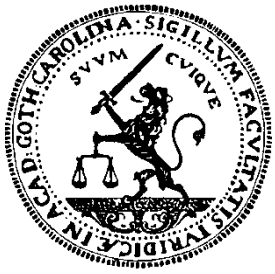

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Selective distribution systems and online platform bans

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Contents

Summary

The Internet has over the past years significantly changed the way in which goods and services are distributed. E-commerce has made it possible for businesses to advertise and sell their goods to a wider range of consumers. In particular third-party online platforms, such as Ebay and Amazon, have become important sales channels that offer intense intra-brand and inter-brand competition and increased price transparency. However, manufacturers of quality brands have argued that online marketplaces constitute an inadequate selling environment, and fear a decline in the value of their products and a loss in their image. The aim of this thesis is to examine the question concerning restrictions for authorized retailers in a selective distribution system to use non-authorized third-party platforms.

Sammanfattning

Internet har de senaste senaste åren väsentligt förändrat det sätt på vilket varor och tjänster distribueras. E-handeln har gjort det möjligt för företag att marknadsföra och sälja sina varor till ett bredare utbud av konsumenter. I synnerhet har online-plattformar, såsom exempelvis Ebay och Amazon, blivit viktiga försäljningskanaler som erbjuder intensiv inommärkes- och mellanmärkeskonkurrens, samt en ökad pris transparens. Å andra sidan har tillverkare av kvalitetsvarumärken hävdat att de digitala marknadsplatserna utgör en olämplig försäljningsmiljö och fruktar en nedgång i värdet av sina produkter och en förlust i deras image. Syftet med denna uppsats är att undersöka lagligheten av restriktioner för auktoriserade återförsäljare i ett selektivt distributionssystem att använda icke auktoriserade tredjepartsplattformar.

Abbreviations

Art.	Article
BkartA	Bundeskartellamt (German Competition Authority)
CJEU	Court of Justice of the European Union
Commission	European commission
E-commerce	Electronic commerce
ESI	E-commerce Sector Inquiry
ESI Final Report	Final report on the E-commerce Sector Inquiry
EU	European Union
FCA	Autorité de la concurrence (French Competition Authority)
SDS	Selective distribution system
SDA	Selective distribution agreement
Staff Working Document	Commission Staff Working Document Accompanying the document Report from the Commission to the Council and the European Parliament Final report on the E-commerce Sector Inquiry {COM(2017) 229 final} 1
TFEU	Treaty on the Functioning of the European Union
VBER	Commission Regulation (EU) No 330/2010
Vertical Guidelines	Guidelines on Vertical Restraints

1. Introduction

Selective distribution systems (hereinafter: SDSs) and restrictions on online sales have recently been the object of intense scrutiny and debate.[1] The attention has mainly been attracted by the question regarding the extent to which restrictions limiting the ability of distributors to sell via online marketplaces are compatible with EU competition rules.[2] While manufacturers have argued that the restrictions are crucial to ensure high-quality and efficient distribution and to preserve goods' luxury image, Antitrust authorities and the "pro-internet lobby" have raised concerns that the restraints also can serve to protect traditional sales areas and general price levels.[3]

Following the 2011 *Pierre Fabre* ruling, the Bundeskartellamt (BkartA) took the position that manufacturers no longer could rely on the aim to protecting their brand or a luxury image in order to justify a SDS. In 2014 and 2015 the BkartA found that Adidas and Asics general bans on sales via online marketplaces, such as Amazon and eBay, in SDS restricted intra-brand competition, and particularly hurt small and medium-sized retailers since presence on a third-party marketplace is vital for customers being able to find them.[4] The French Competition Authorities' (FCA) case handling during the time period was also line with the position taken by the BkartA.[5] Thus, there was a growing movement that held the view that retailers should not be restricted their ability to sell via third-party platforms.

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[1] Jones & Sufrin (2018), Page 754.

[2] According to the Commissions' ESI Final Report, 18 % of retailers have agreements with their suppliers that contain restrictions on marketplace sales. In Germany 32 %, in France 21 % and in the Netherlands 17 % of retailers report experiencing marketplace restrictions. Paragraph 15.iii and 38-43 of said report.

[3] BkartA, argued that manufacturers want want to avoid increased price transparency and increased price competition by introducing marketplace restrictions. See BkartA Press Release, 2018, Page 1.

[4] Case B3-137/12 and case B2–98/11.

[5] FCA Press Release, 2015.

In light of the French and German competition authorities strong positioning against third-party platform bans, the Court of Justice of the European Union (CJEU) 2017 ruling in the *Coty* case came as a surprise to a number of commentators. The CJEU held that a supplier of luxury goods *can* prohibit its authorized distributors from selling those contract goods on third-party marketplaces.

The Coty judgement did however not end the debate. Since, BkartA has made it clear that it will continue to penalize platform bans concerning non-luxury goods.[6] In contrast, the Commission[7] and FCA[8] have advocated that the findings in Coty apply across all business sectors. According to the Commission's E-commerce Sector Inquiry (ESI) marketplace restrictions are not uncommon, as almost 20 percent of retailers report to have agreements with their suppliers containing marketplace restrictions. The practice of online marketplace bans could according to a 2016 study deprive European retailer of up to € 26 billion of retail revenue, which could be diverted elsewhere.[9] Thus, the issue has important implications for the EU economy.

1. 1 Purpose

The aim of this thesis is to investigate the extent to which restrictions limiting the ability of authorized retailers, operating within a selective distribution system, to sell via online marketplaces are compatible with the EU competition rules.

[6] BkartA Press Release, 2018, Page 2-3.

[7] Competition policy brief 1/2018, Page 4.

[8] In a decision on 24 October 2018 the FCA cleared a platform ban that chainsaw manufacturer Stihl imposed on its distributors, thus extending the reach of the Coty judgment beyond the luxury world and into other high-end technical goods. See FCA Press Release, 2018.

[9] Copenhagen Economics, 2016, Page 32 and 48.

1. 2 Methodology and material

In preparing and writing this thesis I used a conventional legal dogmatic methodology and the methodology of EU law. The legal dogmatic method is primarily based on analyzing the traditional sources of law, e.g. law text, case law, legislative history and doctrine. The methodology of EU law refers to the analysis of the argumentation and decisions of mainly the CJEU and the Commission.[10]

Within EU law it is central to distinguish ”hard law” from ”soft law”. The term hard law refers to primary and secondary legislation which are binding for all member states. For the purpose of this paper the most relevant sources of primary and secondary legislation are article 101 TFEU and the Regulation 330/2010 (hereinafter: VBER). TFEU, as a constituent Treaty, sits on the top of the hierarchy.[11] Soft law, on the other hand, are sources that are not legally binding in themselves, but may still have practical effect. The recommendations and opinions expressed by the Commission in its policy guidelines are an example of soft law.[12]

Case law from the CJEU is of great importance since the Court, according to article 267 TFEU, has the exclusive competence over interpreting the EU treaties. In contrast, the Commissions decisions are not binding per se. However within EU competition law, the Commission has a supervisory task and acts as investigator, plaintiff, prosecutor, judge and executor, all at the same time.[13] Since the Commission is the principal enforcer of the EU’s competition rule, its decisions are considered indicative on what is considered legal, and its guidelines on the application of competition law

[10] Nääv & Zamboni (2018), Page 21, 109, 122-123.

[11] Craig & De Búrca (2015), Page 111.

[12] Ibid, Page 109.

[13] Jones & Sufrin (2018), Page 893.

are a key source.[14] Thus, in this thesis, the Vertical Guidelines together with case law from the CJEU have been in the center when interpreting the relevant provisions.

In order to investigate whether competition in the e-commerce sector was restricted, the Commission in 2015 initiated an inquiry (the ESI). During the inquiry evidence from nearly 1.900 companies operating in e-commerce of consumer goods was gathered and around 8.000 distribution and license contracts were analyzed. The findings in the ESI have been used in the writing of this thesis as it provides new, relevant information.

1. 3 Outline

This paper is organized in the following manner. Chapter two is based on a descriptive method and familiarizes the reader with online marketplaces and SDSs, explaining their main functions and impact on competition. The aim of this chapter is to set out the theoretical and economic framework that is necessary to understand before the discussions and analyses of chapter three and four. The chapter also provides essential information about selective distribution systems and examines their potential benefits and harms to competition. The intention is to give the reader the essentials to enable the following chapter to be understood in the right context.

Chapter three is the main chapter of this thesis as it explains the application of EU competition law on selective distribution systems implementing restrictions on the use of online marketplaces. The chapter begins with a description of the basic structure of article 101 and its interaction with the VBER, as well as a historical account of the treatment of vertical restraints within EU law. Next the two key legal instruments and their interpretation in case law are examined in depth.

[14] Nääv & Zamboni (2018), Page 128-129.

Chapter 4 sums up the work, draws conclusions from the findings in the previous chapters and provides an answer for the research question.

1. 4 Limitations

In view of the limited space available for this thesis, it would not be practically possible to make an in-depth analysis of all decisions and cases relating to the issue at hand. In order to provide examples of the different views within the European Competition Network, a selection of particularly interesting judgements and decisions has been made. The national cases Adidas and Asics have been chosen to showcase the strong position the BkartA has taken against platform bans. Further, the Commissions approach has been examined as it views stand in stark contrast.

The question set out in the purpose is aimed to be answered *de lege lata*. This means that the thesis is more concerned about where the law currently stands, rather then what the law should be.

2. Online Platforms and Selective Distribution

2. 1 Online marketplaces

An online marketplace is a platform acting as an intermediary that connects different user groups (sellers, buyers and potentially advertisers) and facilitates transactions between them. Sellers can list their products on the marketplace and buyers can find and buy these products.

2. 1. 1 Efficiencies for Consumers

It is generally accepted that the Internet *lowers search costs*[15] for consumers.[16] It can be argued that online marketplaces further limits consumers' search costs. Since various suppliers can list their products on an online marketplace, consumers can better compare the suppliers different offers. Information about prices, technical characteristics and delivery options is thus more easily accessible.[17]

Inter-brand competition is stimulated by the market transparency which allows consumers to compare prices. As customers are better informed and more sensitive to increases in price, they will purchase more of a product only if they deem that quality or services' improvements justify the price increase, which *incentivizes innovation.*[18] Price transparency further eliminates distributors incentive to exaggerate their pricing, since consumers easily can turn to another distributor providing a *lower price*.

One of the main benefits of online marketplace for consumers is the *convenience* it offers. Third-party platforms often favored by end consumers

[15] Search costs are the costs involved for the consumer in searching different products and services.

[16] Petropoulos, Concurrences Review (2018), Page 2.

[17] Copenhagen Economics (2016), Page 30.

[18] Ibid, Page 55.

because of their simple and safe payment methods and the department store character of the marketplaces (one-stop shopping). When all parameters remain equal (price, quality, type of good sold and brand) the convenience offered by online marketplaces in comparison with the offline retail channel, creates a higher consumer surplus and consequently *higher social welfare.*[19]

According to a 2016 survey among consumers of electronics, third-party platforms offer *more choices* than any other channel and offers products at more *attractive prices.*[20]

2. 1. 2 Efficiencies for Small and Medium Enterprises

SMEs'[21] are of great importance for the EU economy: they constitute 52 % of EU retail turnover and 99 % of the businesses in the EU.[22] Online marketplaces help SME's to get and grow online. SME's benefit from online marketplaces in three core ways: they provide retailer i) lower cost, ii) wider reach, iii) participation in the mobile and other technological revolutions, compared to selling via their own websites.[23]

SME's largely depend on online platforms when starting their online presence. In a 2013 study conducted by law firm Sidley Austin LLP, 70% of the surveyed sellers had started their online operations with online marketplaces, 19% with both marketplaces and their own online shop at the same time, and only 10% had started online through their own online shop.[24] Since the investment in technology, marketing, back-end

[19] Ibid, Page 30.

[20] Ibid, Page 30.

[21] SMEs are defined in the EU recommendation 2003/361 as entities engages in economic activity with less than 250 employees and whose annual turnover does not exceed 50 million €.

[22] EU Commission, "What is an SME?".

[23] Copenhagen Economics (2016), Page 19.

[24] Ebay, (2016), Page 5.

functionality and user experience are borne by the marketplace, the entry barriers for SME's are lowered.[25]

SME's that can not afford wide-reaching advertising campaigns, benefit from that online platforms give access to a large clientele. Through such platforms retailer can become visible and sell products to a large consumer base with limited investments and effort.[26] Online marketplaces make cross-border e-commerce much easier for SME's that do not have the capacity to establish their own cross-border trade network.

The growth of mobile-commerce is a challenge for smaller retailers since developing a mobile app may be cost-prohibitive. Further, for convenience reasons mobile shoppers tend to concentrate their mobile shopping activity on only a few applications from large providers which allows them to reach a great variety of products.[27] Online marketplaces help SME's reach m-shoppers, since their products automatically will be offered through the marketplace's app.[28]

2. 1. 3 Potential harms for Manufacturers

Manufacturers of branded goods, in particular luxury goods, have argued that online marketplaces constitute an inadequate selling environment, and have pointed e.g. to the lack of proper pre- and post-sale services by retailers. Other reasons manufacturers provide for restricting sales via online marketplaces is a wish to prevent the sale of counterfeit products on marketplaces[29] and protect existing distribution channels from free-riding.[30]

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[25] Ebay (2016), page 5. See also Copenhagen Economics (2016), Page 19.

[26] ESI Final Report, Paragraph 14.

[27] Online marketplace apps are currently among the most popular shopping apps. Around 30 % of German mobile users access eBay and Amazon via their phones, see Copenhagen Economics (2016), Page 21-22.

[28] Ibid, Page 21.

[29] Shoe manufacturer *Birkenstock* stopped selling its products on the European sites of *Amazon* on January 1st, 2018, arguing that *Amazon* is not energetic enough in tackling product counterfeiting. See Frankfurter Allgemeine (2017).

[30] ESI Staff Working Document, 2017, Page 154.

2. 2 The concept of selective distribution

In EU competition law, SDSs are defined as arrangements where the supplier undertakes to sell the contract goods or services only to distributors selected on the basis of specified criteria and where these distributors undertake not to sell such goods or services to unauthorized distributors within the territory reserved by the supplier to operate that system.[31] Thus, on the one hand SDSs restrict the number of *authorized distributors*, and on the other the *possibilities of resale.* SDSs are designed to be of ”closed character”, making it impossible for non-authorized dealers to obtain supplies.[32]

According to the Commission’s ESI the use of SDS has increased significantly with the growth of e-commerce.[33] Half of the manufacturers that participated in the Inquiry replied that they nowadays make use of selective distribution for at least some of their products. When askes to identify their reasons for utilizing SDSs manufacturers commonly stated a want to ensure high quality distribution, protect brand image, influence the quality of pre- and after-sales services and enhance the overall shopping experience of customers.[34]

2. 2. 1 Potential benefits

According to current mainstream economics, selective distribution agreements (SDAs) have great potential for generating welfare-enhancing effects.[35] SDSs are effective contractual means of protecting brand image and improving the pre-sales services and promotional efforts, by eliminating the *free-rider problem* between distributors.

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[31] Article 1.1.e VBER.

[32] Vertical Guidelines, Paragraph 174-178.

[33] ESI Final Report, Paragraph 15.ii.

[34] ESI Preliminary Report, 2016, Paragraph 199 - 204 and 907-909.

[35] Monti (2007), Page 347.

The right brand image is for many goods vital for maintaining and possibly enhancing the demand of the product. To ensure that customers are receiving the right image, the manufacturer might require retailers to provide specific sales assistance, and ensure that the advertisement and the presentation of the goods is of such kind that it suits the brand. Allowing suppliers to protect the image of its products means allowing consumers who appreciate the value of such goods to enjoy them. If manufacturers were left without a possibility to protect the image of their products, such products might disappear from the market leaving consumers with less to choose from.

Free-riding refers to the situation when a market actor takes advantage of the investments and inputs from another market actor. Such problems arise when, for example, some retailers choose not to invest in the sales services (e.g. product presentation, advisory services) and attract demand away from other retailer making such investments by offering lower prices. Since the promotional efforts do not pay off in this case, there is less incentive for it to make such investments, although this would be desirable from both the manufacturer's and consumer's perspective.[36]

2. 2. 2 Potential harms

Since SDSs are designed to limit both the number of authorized distributors and the possibilities for resale of the contract goods by the selected distributors, they generally *reduce intra-brand competition.* Reduced intra-brand competition is however only harmful where there is limited inter-brand competition.[37] Where inter-brand competition is weak, distributors are able to *raise prices*.[38]

[36] Monti (2007), page 354.

[37] Vertical Guidelines paragraph 174.

[38] Monti (2007), page 351.

In this context, SDSs have been deemed appropriate only for the distribution of certain kinds of goods, as it satisfies the request for higher quality by demanding purchasers. Customers seeking to purchase sophisticated goods, such as branded or technically complex products, have high expectations in terms of advice and assistance pre and after sales, and in terms of brand image and appearance of the shopping environment. Further, customers of sophisticated goods are willing to pay a higher price in order to have it. If inter-brand rivalry on the market is lively, a reduction of intra-brand competition is not of great concern since customers who prefer lower prices can buy products from different suppliers.[39] However, if there are parallel networks of selective distribution on the relevant market, the ”cumulative effect” can produce negative effects such as anti-competitive *foreclosure* of actual or potential competitor and *impediments to market integration.*[40]

[39] De Faveri, Global Antitrust Review (2014), Page 169.

[40] Vertical Guidelines, Paragraph 100. See also case 75/84, Paragraph 40.

3. The EU Competition Framework

For an SDS to be caught by EU Competition Law, it must be covered by Article 101.1 TFEU. Article 101 is one of the cornerstones of EU Competition Law and prohibits anti-competitive agreements. Article 101.2 renders that agreements caught by Article 101.1 are automatically void. In cases where the benefits outweigh negative effects on competition, the agreement may however be allowed if the exemption set out in Article 101.3 is applicable. The requirements in Article 101.3 are presumed to be fulfilled in cases where the agreement falls under any of the block exemption regulations: in this case the prohibition in Article 101.1 does not apply. SDS, falling under the category of vertical agreements, may be benefit from application of competition law under the VBER. Provided that the requirements stipulated in the regulation are met, VBER functions as a safe haven for vertical agreements.

3. 1 The historical treatment of vertical restraints

The appropriate policy treatment for vertical restraints has been one of the most contentious subjects within EU Competition Law.[41] A vertical agreement is defined as an agreement entered into between undertakings each of which operates at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services.[42] A vertical restraint is a restriction on the competitive behavior of a party that occurs in the context of a vertical agreement.[43] In the upstream market, manufacturers compete against each other to sell their products to retailers. Manufacturers develop specific brands in order to distinguish them from other brands sold in the same

[41] Dobson, Loughborough University Business School Research Series (2005), Page 1.

[42] Article 1.1.a VBER.

[43] In article 1.1.b VBER a vertical restraint is defined as ”a restriction of competition in a vertical agreement falling within the scope of Article 101(1) of the Treaty”.

market segment. The upstream competition is thus called "*inter*-brand competition".[44] The competition between retailers that sell products of the same manufacturer is called "*intra*-brand competition."[45]

In the early days of the EU, vertical restraints were treated with great suspicion.[46] The Commission, which during this era was inspired by the Freiburg school, was primarily concerned with economic freedom and market integration, putting these aims above considerations of economic efficiency and consumer welfare. Since vertical restraints limit the distributors' economic freedom, the Commission adopted a very strict approach and applied Article 101.1 very widely. Thus, for the vast majority of vertical restraints an exemption was necessary. The sole way of obtaining exemption under Regulation 17/62 was however to notify the agreement to the Commission.[47] The Commission, unable to cope with the number of notifications and after being heavily criticized during the 90's, thus drafted "Block Exemption" regulations for the more common types of vertical restraints.[48]

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[44] An example of inter-brand competition is Coca-Cola versus Pepsi, and Levi versus Lee Jeans.

[45] Distributors of the same branded product can compete on price or non-price terms. A pair of Levi jeans may for example be sold at a lower price in a discount store as compared to a department store, but often without the amenities in services that the latter provides. The amenities in services offered by the department store constitute intra-brand *non-price competition.* The lower price offered by the discount store constitute intra-brand *price competition.* In order to stimulate intra-brand non-price competition, some manufacturers seek to maintain uniform retail prices for their products and prevent intra-brand price competition through business practices such as resale price maintenance.

[46] Vertical restrictions were considered critical under competition law ever since the CJEU's ruling in *Consten and Grundig* in the late 60s.

[47] Article 4 Regulation 17/62.

[48] Critics argued that based on insights from economic theory, certain categories of agreements could generally be deemed not to be harmful for the competitive process in the EU internal market.

3. 2 Current legislation

3. 2. 1 Article 101.1 TFEU

Article 101.1 states that all agreements 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 are prohibited.

In order to determine if Article 101.1 is applicable in a certain case, there are three questions one has to answer. First, one has to examine whether there is an *agreement* between undertakings. Secondly, an assessment has to made on whether the agreement has any actual or *potential appreciable effect* on *trade between Member States.* The last question to be asked is if the agreement has as its *object* or *effect* to restrict competition. For the purpose of this paper, only the last question shall be examined more in depth.

3. 2. 1. 1 Restriction of competition ”by object” or ”by effect”

An agreement is caught by the prohibition of Art. 101 if either its object or its effect is the restriction of competition. Since restrictions by *object* are treated in a stricter manner, it is of great significance to ascertain whether an agreement restricts competition by object or by effect. If it is shown that the ”precise purpose” of an agreement is to restrict competition, the negative effects of the agreement as well as the unlikelihood of net positive effects are *presumed.* Since negative effects on competition are assumed, a violation of Art. 101 is proved per se, unless the undertakings can demonstrate that the agreement satisfies the Art. 101.3 criteria.[49] If an agreement is not considered as having an anti-competitive objective, the

[49] Sufrin & Jones (2018), Page 192. See also Guidelines on Article 81.3, Paragraph 11.

burden of proving that the agreements has actual or potential anti-competitive *effects* is on the person alleging the breach.[50]

Restrictions by object are those that by their very nature, and in the light of the objectives pursued by the competition rules, have a high potential of negatively effecting competition. The distinction between infringements ”by object” and ”by effect” thus stems from the fact that certain forms of collision between undertaking can be regarded, by their very nature, as being injurious to the proper functioning of normal competition. When assessing whether an agreement involves an infringement ”by object”, several factors are taken into consideration, such as the content of its provisions, its objectives and the economic and legal context of which it forms a part.[51] The examination of an agreement is objective, thus a subjective intent on the part of the parties to restrict competition is a relevant factor, but not a necessary condition.[52]

3. 2. 1. 2 Metro

The CJEU’s approach when assessing agreements under Article 101.1 TFEU, has been specifically tailored to individual categories of agreements, creating a number of specific tests for assessing different types of contractual clauses. In the cases Metro I-II the CJEU’s test for assessing the legality of SDA was developed.

SABA, a manufacturer of high quality and technically advanced electronics, distributed its products through a SDS and operated a policy of only distributing its good through specialist retailers. Metro, a self-service wholesaler, appealed to the CJEU after being denied access to SABA’s distribution network. The elimination of competition from non-specialist retailers, who by cutting services would have been able to offer the contract

[50] If its found that an agreement has actual or potential anti-competitive effects, it is likely to fall within Art. 101.1. For the exemption in Art. 101.3 to be applicable sufficient counterbalancing effects must be shown.

[51] C−32/11, Allianz Hungária Biztosító and Others v. Gazdasági Versenyhivatal,, ECLI:EU:C:2013:160, paragraph 36 and the case-law cited. See also Guidelines on Article 81.3, Paragraph 22.

[52] Guidelines on Article 81.3, Paragraph 22

goods at lower prices than specialist retailers, resulted in higher prices for consumers which Metro argued to be incompatible with the purpose of Art. 101.1. SABA argued that the policy ensured that customers received the expert technical advice and support which the goods required.

The CJEU agreed with Metro's assessment that the SDS was likely to result in higher prices. The Court however also held that while price competition is so important that it could never be eliminated, it is not the only effective form of competition. The aim of maintaining workable competition can be reconciled with other legitimate objectives, thus certain restrictions on competition are permissible, provided that they are essential for attaining those ofter objectives and that they do not eliminate competition entirely. The restriction on price competition was permissible since the SDS ensured that customers received the expert technical pre-sales advice, required by the products nature.[53]

In its judgment, the CJEU found a SDS will fall outside the scope of Article 101.1 if said system is *purely qualitative*. A SDS is considered to be purely qualitative if three criteria are satisfied: i) the nature or characteristics of the product in question necessitates a SDS, ii) retailers are chosen by reference to objective criteria of qualitative nature which are set out uniformly and applied in a non-discriminatory manner, and iii) the criteria set out do not go beyond what is necessary for the product in question.[54] If further criteria for selection are added that directly limit the potential number of dealers by, for instance, requiring minimum or maximum sales, by fixing the number of dealers, it is a *quantitative* SDS. Quantitative restrictions are likely be caught by Art. 101.1.[55]

Almost a decade later, the Commission approved the renewal of SABA's grants for exemption of their SDS:s. Metro argued that the renewal was

[53] Case 26/76, Paragraph 20, and Case 75/84, Paragraph 54.

[54] Case 26/76, Paragraph 20-21. See also Vertical Guidelines, Paragraph 175.

[55] Vertical Guidelines, Paragraph 175-176.

wrongful since the market structure had changed significantly since the last decision; the number of SDS operated by major manufacturers had dramatically increased, leading to a foreclosure of non authorized distributors. In the judgment in Metro II, the CJEU acknowledged a limitation to the presumptive legality of purely qualitative SDS. The CJEU found that Article 101.1 might be applicable to a qualitative SDA when a such big part of the market is covered by SDS that there is no room left for alternative distribution models.[56] The CJEU thus formulated a fourth criteria to the presumptive legality of an SDS under Article 101.1: the cumulative effect of SDSs in the market must not preclude other forms of distributions on the market or result in rigid price structure.

3. 2. 1. 3 Leclerc

In 1996 Leclerc, a purchasing association which supplied a network of French supermarkets, in two separate proceedings brought actions against the Commissions' decisions exempting the SDSs of the two manufacturers of luxury cosmetic products, Givenchy[57] and YSL.[58] Retailers were required to employ staff with a professional qualification in perfumery, provide certain services, and the location and fittings of the store had to reflect the prestige of the brand name.

The General Court found that while the Metro test was originally developed for high-end and technically advanced consumer electronics, other types of products could also require SDS. The Court held that *luxury cosmetics,* and in particular luxury perfumes, are products which are the result of meticulous research and which use materials of high quality, in particular in their presentation and packaging. These products enjoy a "luxury image" in the eyes of consumers, which distinguished them from other similar products lacking such an image. In consumers' minds there is only a low

[56] C-75/84, Paragraph 40.

[57] Case T-19/92 Leclerc v Commission ECLI:EU:T:1996:190.

[58] Case T-88/92 Leclerc v Commission ECLI:EU:T:1996:192.

degree of substitutability between luxury cosmetic products and similar products.[59] The characteristics of luxury cosmetics should thus not be limited to their *material characteristics:* it also encompasses the specific *perception* that consumers have of them.[60] If the products were not sold in appropriate conditions, there would be a risk of deterioration in product presentation, which could harm its ”aura of luxury”, thus the very *character* of the products. Criteria that sought to ensure that such goods were presented in a manner that preserved their luxury image thus constituted a legitimate requirement for the purposes of the case law established in Metro.[61]

3. 2. 1. 4 Pierre Fabre

French manufacturer of cosmetics and personal care products, Pierre Fabre, which distributed its products through a SDS, sought to market the goods primarily through retail pharmacies. Additionally, sales were required to be made exclusively in a physical space, in which a qualified pharmacist had to be present. FCA interpreted the clause as prohibiting retailers from selling the contract goods online and declared the SDS incompatible with Art. 101. Pierre Fabre contended that ban was justified by health protection purposes and by the need to prevent counterfeits. On appeal, the French Court asked the CJEU to make a preliminary ruling on whether an absolute ban on online sale to end-users, imposed on authorized distributors in the context of a SDS, constituted a restriction of competition by *object* within the meaning of Article 101.1.[62]

First, the CJEU stated that a SDA restricts competition by object, unless the Metro conditions are fulfilled.[63] Second, it held a SDS that aims at the fulfillment of *a legitimate goal* capable of *improving competition* in relation

[59] Case T-19/92, Paragraph 114.

[60] Paragraph 115, Ibid.

[61] Paragraph 120, Ibid.

[62] Case C-439/09, Paragraph 31.

[63] Ibid, Paragraph 39.

to factors other than price, is compatible with Art. 101.1 if the Metro criteria are fulfilled.[64]

The CJEU then sought to provide guidance on what could be considered *a legitimate goal* under Art. 101.1. The CJEU held that in the light of the Treaty's rules on free movement it could not accept arguments relating to the need to provide advice to the customer and to ensure protection against incorrect use of products, in the context of non-prescription medicines, as justifying a ban on online sales: selecting specialist distributors was sufficient to guarantee product quality.[65] The Court then concluded, without any further rationalization, that the aim of maintaining a *prestigious image* was not a legitimate aim for restricting competition.[66]

Following the CJEU:s ruling, the national Court upheld the FCA's prohibition decision.[67]

3. 2. 2 Article 101.3 TFEU

Art. 101.3 sets out an exception rule for agreements caught by Art. 101.1. An otherwise prohibited agreement is valid and enforceable if the four conditions of Art. 101.3 met.[68] It is for the undertaking claiming the benefit of the exception rule to proof that the conditions in the article are fulfilled.

The two first requirements are that the agreement in question must provide efficiency gains and contribute to improvement of production and distribution, and that a fair share of the results and benefits shall reach the consumers. The restrictions must be necessary for the realization of the associated efficiency gains. Lastly, the agreements shall not eliminate competition in respect of a substantial part of the products in question.

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[64] Ibid, Paragraph 40-41.

[65] Ibid, Paragraph 44.

[66] Ibid, Paragraph 45-46.

[67] Cour d'appel de Paris, judgment of 31 January 2013 (n° 2008/23812).

[68] Guidelines on Article 81.3, Paragraph 1.

3. 2. 3 The VBER

Since the conditions in Art. 101.3 are broad and in need of interpretation, it is often a difficult task to predict the outcome of an assessment under said article. With the intention of making the application of Art. 101.3 easier, the VBER was drafted and formulated in a more straightforward manner. A SDS that meets the conditions of the VBER will be presumed to fall outside Art. 101.1.[69] The regulation requires that neither the supplier's marketshare nor the distributors marketshare exceed 30%, and that the agreement does not contain a so-called hardcore restrictions to competition.[70]

3. 2. 3. 1 Hardcore restrictions

Art. 4 of the VBER contains a list of hardcore restrictions. If an agreement contains one of these restrictions, this has the effect of removing the entirety of the agreement from the scope of the VBER, and it gives rise to the presumption that the agreement falls within Art. 101.1.[71] For the issues under consideration article 4.b and 4.c are of particular relevance.

3. 2. 3. 2 Articles 4.b-c VBER

Art. 4.b relates to *market partitioning* by territory or by customer group.[72] The provision prohibits manufacturers from restricting the territory into which or the customers to whom the distributor may sell the contract goods or services. However, restrictions on the distributor's place of establishment and restricting sales by the members of a SDS to unauthorized distributors, do not qualify as hardcore restrictions within the meaning of Article 4.b. The primary aim of the provision is to prevent the blending of exclusive distribution with selective distribution.[73]

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[69] Article 2 VBER. If an agreement fulfills the conditions set out in the regulation, the agreement is automatically valid and enforceable, as it is said to automatically be benefitting from Article 101.3. The regulation thus clarfies when vertical restraints can be exempted with respect to Article 101.3.

[70] Articles 3 and 4 VBER.

[71] Paragraph 47, Vertical Guidelines.

[72] Paragraph 50, Vertical Guidelines.

[73] Vertical Guidelines, Paragraph 50.

According to Art. 4.c the VBER does not apply to vertical agreements which have the object of restricting active or *passive sales to end users* by members of a SDS operating at the retail level of trade.[74]

3. 2. 3. 3 Pierre Fabre

Pierre Fabre argued that the ban on selling the contractual goods online was equivalent to a prohibition on operating out of an unauthorized establishment. The Court opposed this interpretation and instead held that ”place of establishment” within the meaning of the Article 4.b referred to physical outlets and did not include the Internet.[75]

The CJEU however held that the prohibition of utilizing the Internet as a method of marketing had as its object the *restriction of passive sales to end users* wishing to purchase online and located outside the physical trading area of the relevant member of the SDS. The contractual clause thus amounted to a hardcore restriction within the meaning of Art. 4.c VBER.[76]

[74] Article 4.c VBER

[75] Case C-439/09, Paragraph 55-58.

[76] Ibid, Paragraph 54 and 59.

3. 3 The Legal Assessment of Selective Distribution and Platform bans

3. 3. 1 Adidas

In June 2014 the BkartA concluded its administrative proceeding against Adidas, which agreed to amend its ban on online platforms. Adidas, a manufacturer of sports articles, operated an SDSs in which its goods only were sold to final customers.[77] After revising its guidelines for e-commerce in April 2012, sales via marketplaces were prohibited. The BkartA thus initiated proceedings to examine whether the rules established by Adidas were compatible with Art. 101.[78]

The BkartA found that the per se ban on sales via online marketplaces constituted a restriction of competition within the meaning of Art. 101.1. Adidas e-commerce conditions did not fulfill the Metro criteria, since specific distribution channels were excluded without any consideration of qualitative criteria. Moreover, an absolute ban was not proportionate, since the desired result of safeguarding the quality or distribution of the sports articles could be achieved with more lenient alternatives, i.e. setting specific qualitative criteria that marketplaces should meet.[79]

The BkartA also stated that absolute bans on online marketplaces restrict competition by limiting the possibilities of retailers to reach more and other customers over the internet. The analysis was heavily focused on SME's dependence on third-party platforms.[80]

[77] Case B3-137/12, Page 1-2.

[78] As Adidas reached market shares of over 30 % on the markets for football clothing and shoes in Germany, the VBER was not applicable.

[79] Case B3-137/12, Page 3.

[80] Ibid, Page 4.

Lastly, the BkartA found that the SDA could not be exempted under Art. 101.3, as the restriction in question did not produce adequate efficiencies, was not indispensable, and since consumers did not receive a fair share of the benefit.[81]

3. 3. 2 Asics

Asics, a manufacture of running shoes, operated an SDS and had by the end of 2012 prohibited its authorized retailers from using internet platforms for the purpose of selling or advertising the contract goods. In its decision of 26 August 2015, the BkartA found that Asics had infringed Art. 101.1 by restricting the online sales activities of small and medium-sized authorized dealers in particular.[82] The BkartA stated that the SDS was not proportionate and did not fulfill the Metro criteria. Further, the BkartA argued that the ban significantly limited the authorized distributors, in particular the SMEs', ability to make online sales to end customers, thus falling within the scope of Art. 4.c VBER.[83]

3. 3. 3 The Commission's approach

The Commission has suggested that absolute marketplace bans do not constitute hardcore restrictions under the VBER.[84] According to the Commission the Pierre Fabre ruling should only directly apply to online marketplace bans if they amount to a *de facto prohibition on the use of the Internet*. If retailers still, despite a ban on online marketplaces, can use the online environment, the two restrictions should not be equated.[85]

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[81] Ibid, Page 5-8.

[82] Case B2-98/11, Page 1-4.

[83] Ibid, Page 10.

[84] Staff Working Document, 2017, Paragraph 499-514. See also paragraph 54 of the Vertical Guidelines, according to which the Commission, at the time when the VBER was adopted, did not consider marketplace bans to amount to hardcore restrictions.

[85] Staff Working Document, 2017, Paragraph 502-503.

According to the ESI, online marketplaces' importance as a sale channel varies significantly between products as well as between member states[86]: thus, bans on online marketplaces can not automatically be compared with the ban imposed in Pierre Fabre.[87] Secondly, the Commission argues that it has not been able established that online marketplaces' consumers are a "definable customer base" within the meaning of Art. 4.b.

3. 3. 4 Coty

Coty, a supplier of luxury cosmetics, operated a SDS and imposed an absolute ban on the use of online platforms for the sale of the contract goods. In the wake of a disagreement between Coty and its authorized distributor Akzente, the national Court referred the matter to the CJEU to seek assistance on whether the clause i) was compatible with Art. 101.1, and ii) if it constituted a hardcore restriction under Art. 4 VBER.[88]

3. 3. 4. 1 Analysis under Art. 101.1

In contrast to Pierre Fabre, the CJEU held that if the Metro criteria are met, a SDS with the aim of preserving an aura of luxury of those goods, is compatible with Art. 101.1 TFEU.[89] The Court thus clarified that brand image protection, in the case of luxury goods, constitutes a legitimate aim of a SDS. The CJEU found that the findings in Pierre Fabre were limited since the contract goods were cosmetic and body hygiene products, not luxury products. The Court, referring to settled case law, thus found that the characteristics of luxury goods and their nature may require the implementation of a SDS in order to preserve their quality and to ensure that they are used properly.[90]

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[86] Marketplaces play a more important role in some member states. For example in Germany 62 % of the respondent retailers used marketplaces, 43 % in the UK and 36 % in Poland. Compared to other Member States such as (Italy 13 %) and Belgium (4%). See ESI Final Report, paragraph 39.ii. See also Staff Working Document, 2017, Paragraph 504.

[87] Staff Working Document, 2017, Paragraph 454-456.

[88] Case C-230/16, Paragraph 8-20.

[89] Ibid, Paragraph 24-29.

[90] Ibid, Paragraph 30-35.

Having found that SDSs of luxury goods can be compatible with Art 101.1, the Court turned it attention to the legality of the clause prohibiting the use of market platforms for online sales. When assessing the disputed contractual clause, the CJEU applied the same analytical structure as for the entire SDS by utilizing the Metro criteria. First the Court concluded that it was common ground that the contractual clause at issue had the i) objective of preserving the image of luxury and prestige of the goods at issue, and that the clause was ii) objective and applied without discrimination to all authorized distributors.

Since the two first Metro criteria were met, the Court focused its attention on whether the clause was proportionate for the achievement of the aim of preserving a luxury image. The CJEU found that such a prohibition in principle was appropriate. First, the prohibition gave the supplier assurance that the luxury goods, in the context of e-commerce, would exclusively be *associated* with authorized distributors.[91] Second, the prohibition would enable the supplier to *monitor* that the goods were sold online in an environment that corresponds to the qualitative conditions that it has agreed with its authorized distributors.[92] Third, since marketplaces regularly sell all kinds of goods, the Court found that they could not preserve the luxury image of luxury goods. The aim could however be achieved when the online sale of luxury goods are carried out *solely in the online shops* of authorized distributors.[93] The exclusive sale in authorized online shops would contributed to the luxury image of the goods in question.

Finally, CJEU took into account that the distributors were *still allowed to use internet* as a selling means, distinguishing the clause at issue from the total ban on online sales found incompatible with Art. 101 in the Pierre Fabre judgment. The Court referred to the Commissions' Preliminary Report

[91] Ibid, Paragraph 42-44.

[92] Ibid, Paragraph 47.

[93] Ibid, Paragraph 50.

on the ESI which found that main distribution channel, in the context of e-commerce, were distributors' own online shops. Since over 90% of distributors surveyed had their own online shop in place, the clause in question did not restrict the effective use of the Internet as a sales channel. Thus, the prohibition did not go beyond what was necessary to achieve the objective pursued.[94]

3. 3. 4. 2 Analysis under the VBER

The referring Court asked whether the clause at issue partitioned the market by costumer group, or whether it restricted passive sales to end consumers.[95]

The CJEU began its analysis by stating that the clause at issue, in contract to the clause that gave rise to the judgment in Pierre Fabre, *did not prohibit the use of the internet as a means* of marketing the contract goods. Second, the Court did *not find it possible to circumscribe*, within the group of online purchasers, third-party platform customers.[96] The CJEU thus found that even if the clause restricted a specific kind of internet sale, it did not preclude all online sales, but only one of a number of ways of reaching customers via the Internet. The prohibition thus did not amount to a restriction within the meaning of Article 4.b or 4.c.[97]

[94] Ibid, Paragraph 52-54.

[95] Ibid, Paragraph 62.

[96] Ibid, Paragraph 65-66.

[97] Ibid, Paragraph 68-69.

4. Conclusion

As has been shown in the second chapter, third-party platforms are important sales channels that offer intense intra-brand and inter-brand competition, increased price transparency and, thus, better information for consumers. By giving access to a large clientele at low costs, online marketplaces lower barriers to entry and enable SMEs to effectively compete with large retailers. Third-party platforms however bring not only advantages, but also disadvantages. Manufacturers on the one hand face the challenge of increasing their sales, and on the other, safeguarding of their brand image. In particular, manufacturers of quality brands fear a decline in the value of their products and a loss in their image.

SDSs have historically been viewed as restrictions of competition ”by effect”. The *Metro* criteria, developed by the CJEU, set out a mechanism for conducting the effects analysis: balancing the anti-competitive and pro-competitive aspects in order to assess the infringement of competition under Art. 101.1. On the contrary, in *Pierre Fabre* the Court stated that “such agreements are to be considered, in the absence of objective justification, as ‘restrictions by object’”.[98] In such a context the Metro criteria are instead used as a mechanism to establish the existence of an objective justification. In *Coty* the CJEU repeated paragraph 39 of Pierre Fabre without the controversial last phrase.[99] The Court’s silence in Coty regarding the classification of SDSs as “by object” or ”by effect” infringement of competition, suggests that the finding in Pierre Fabre were limited to the particular circumstances at hand in that case. If SDSs are “reconsidered” as restrictions by effect, one has to look at the particular clauses within the SDSs and evaluate them on a case-by case basis, rather than discarding the SDSs as a whole as “by object” restrictions of competition.

[98] Case C−439/09, Paragraph 39.

[99] Case C−230/16, Paragraph 26-36, 51-53, 65.

In Coty the CJEU establishes a clear legal framework for assessing third-party platform bans under Art. 101.1. Marketplace bans escape the application of Art. 101.1 provided that the Metro-criteria are fulfilled, whereby resellers are chosen on the basis of objective criteria of qualitative nature, laid down in a uniform way for all potential resellers and applied in a non-discriminatory manner; the characteristics of the goods necessitate a SDS to preserve the quality of such products and their correct use; and the criteria applied by the manufacturer fulfills the conditions of proportionality and necessity. Thus, the assessment of a platform ban must be made on a case-by-case basis, whereby the conditions of *necessity* and *proportionality* ought to be the most contentious. The findings in Coty can thus not be interpreted as endorsing a blanket ban on the use of third-party platforms, since a blanket ban might not always be proportionate to the objective pursued.

Further, in Coty the CJEU states that absolute bans on marketplaces are not to be considered hardcore restrictions. Thus, absolute online marketplace bans should benefit from the VBER.[100]

First, a ban on online marketplaces does not compartmentalize the market by territory or customer group within the meaning of Art. 4.b. Instead online marketplace bans restrict only *how* the distributors can sell: they do not shield other distributors of the network. Further, it is not evident that third-party platforms' customers form a distinct group of customers.

Second, a ban on online marketplaces does not restrict passive sales to end consumers within the meaning of Art. 4.c. Contrary to the restriction at stake in Pierre Fabre, they do not amount to an absolute prohibition on selling online and do not restrict the effective use of the Internet as a sales

[100] An assessment under Art. 101 of a selective distribution agreement, containing a restriction on the use of online platform, would thus only arise where the market shares of the parties are above the 30 % market share threshold of Art. 3 VBER.

channel. Pierre Fabre can only be directly applied to online marketplace bans if they amount to a *de facto* prohibition on the use of the Internet.

The findings of the ESI indicate that when assessing whether a particular marketplace bans restricts effectively the use of the Internet, it is vital to look at the affected geographic market and the specific product. Two other important elements in the analysis is the credibility of brand protection considerations and the need for pre- and post-sale advice.

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