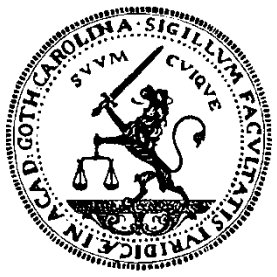

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Blurry Lines

– A Discussion on Information Exchange in Dual Distribution Scenarios from a Legal Certainty Perspective

JURM02 Graduate Thesis

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Contents

Summary

In this thesis the legal certainty issues connected to the way information exchange in dual distribution scenarios is treated by EU Competition law are discussed. The question of how such information exchange should be treated to increase the legal certainty is also discussed.

Starting with an explanation of purely vertical and purely horizontal information exchange and how they are assessed under EU Competition law, it also touches on why these types of information exchange are treated differently.

Furthermore, the thesis explains dual distribution scenarios, what rules apply to them and how these rules can be interpreted today. Other practices that blurry the lines between vertical and horizontal agreements are brought up and two closely related, recent Danish decisions on information exchange in dual distribution scenarios are explained and discussed.

Three different definitions of legal certainty are presented and provide the basis for the discussion on the present issues related to information exchange in dual distribution scenarios and how these issues can be resolved. The main issue is a lack of predictability. This comes from the unclear meaning of the phrase “non-reciprocal agreement” in Article 2(4) VBER and from the unclarity as to how the practices that do not fit into the distinction between vertical and horizontal agreements, are to be treated.

In order to increase the legal certainty in the future, the Commission can remove the phrase “non-reciprocal agreements” from the article, or at least explain it in the vertical guidelines. The Commission could also add a section to the new vertical guidelines that addresses how dual distribution scenarios, and similar practices should be assessed. This way it would be possible to fully take into account the special characteristics of dual distribution.

Sammanfattning

I den här uppsatsen diskuteras rättssäkerhetsproblemen med hur informationsutbyte i situationer med dubbel återförsäljning behandlas inom konkurrensrätten i EU. Även frågan om hur sådant informationsutbyte borde behandlas för att öka rättssäkerheten diskuteras.

Uppsatsen inleds med en förklaring av rent vertikala och rent horisontella informationsutbyten och hur de bedöms under EU:s konkurrensrätt och berör även varför de olika sorterna av informationsutbyte behandlas olika.

Vidare förklarar uppsatsen vad dubbel återförsäljning är, vilka regler som gäller för dem och hur dessa regler kan tolkas idag. Andra beteenden som suddar ut gränsen mellan vertikala och horisontella avtal förs fram och två nya danska beslut om informationsutbyte i situationer med dubbel återförsäljning förklaras och diskuteras.

Tre olika definitioner av rättssäkerhet presenteras och utgör grunden för diskussionen om de nuvarande problemen som finns gällande informationsutbyte i situationer med dubbel återförsäljning och hur dessa problem kan åtgärdas. Det främsta problemet är brist på förutsebarhet. Bristen på förutsebarhet beror på att betydelsen av frasen “non-reciprocal agreement” i Artikel 2(4) VBER är oklar, samt att det är oklart hur beteenden som inte passar in i distinktionen mellan vertikala och horisontella avtal ska bedömas.

För att öka rättssäkerheten i framtiden kan EU-kommissionen ta bort frasen ”non-reciprocal agreement” från artikeln, eller åtminstone förklara frasens betydelse i de vertikala riktlinjerna. Kommissionen skulle också kunna lägga till en sektion i de omarbetade riktlinjerna som berör hur dubbel återförsäljning, och andra liknande situationer, borde bedömas. Detta skulle medföra en möjlighet att till fullo beakta de speciella karaktärsdragen som dubbel återförsäljning har.

Abbreviations

CJEU	The Court of Justice of the European Union
EU	The European Union
EEU	The European Economic Area
MFN-clause	Most Favoured Nation-clause
NCA	National Competition Authority
R&D	Research and development
RPM	Resale Price Management
TEU	The Treaty of the European Union
TFEU	The Treaty on the Functioning of the European Union
UK	The United Kingdom
VBER	The Vertical Block Exception Regulation

1 Introduction

The distinction of horizontal and vertical agreements in competition law may seem obvious. Horizontal agreements are agreements between competitors at the same level of the distribution chain, such as two distributors. Vertical agreements are agreements between parties at different levels of the distribution chain, such as a supplier and a distributor. However, agreements are not always this easily distinguished. In some instances, the supplier will act as a distributor as well, by selling its goods directly to the end customer. In these, so-called, *dual distribution* scenarios, the supplier and the other distributor are competitors.

According to Article 101 of the Treaty on the Functioning of the European Union (the TFEU), all agreements and concerted practices between undertakings 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 void.[1] However, this is not the case if the agreements or concerted practices are contributing to improving the production or distribution of goods or promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit. This *efficiency defence* in Article 101(3) of the TFEU also demands that the restrictions are indispensable to the attainment of these objectives and that they do not allow the undertakings involved to eliminate competition in respect of a substantial part of the products in question.[2]

Based on Article 101(3) vertical agreements have been subject to an exemption from the rules laid down in Article 101(1) since 1999 in the form of two different block exemption regulations from the Commission. According to the current Vertical Block Exemption Regulation (the VBER) from 2010 vertical agreements containing vertical restraints are not void if

[1] Article 101(1) and 101(2) TFEU.
[2] Article 101(3) TFEU.

the agreement meets the requirements in the VBER.[3] In this regulation there is also a provision on vertical agreements between competitors. The general rule is that such agreements are not within the scope of the regulation. However, where competing undertakings enter into a non-reciprocal vertical agreement and the supplier is a manufacturer and a distributor of goods, while the buyer is a distributor and not a competing undertaking at the manufacturing level, the regulation applies.[4] These are the dual distribution scenarios.

The VBER is valid until May 2022 and because of this the Commission has made an evaluation of the functioning of the regulation and the related guidelines. The evaluation will be the basis for the expected decision by the Commission on whether it should let the VBER lapse, renew it or revise it.[5] Generally it was concluded in the related Commission Staff Working Document that the VBER adds value to the EU by increasing the *legal certainty*[6] and guidance available and that there is a continued need for a vertical block exemption regulation.[7] However, some respondents to one of the public consultations that were part of the evaluation was of the opinion that it was unclear if information exchanges in dual distribution scenarios should be treated as part of the vertical relationship or the horizontal one.[8]

Information exchange can both have positive and negative effects on competition. Information on the market enables companies to make strategic decisions, with both positive and negative effects on competition, and public information on products and prices can help consumers when they are making

[3] Article 2(1) and 3(1) VBER.
[4] Article 2(4) VBER. The same applies in cases when the supplier provides services at several levels of trade and the buyer provides goods or service at retail level, as long as the parties are not competitors at the level of trade it bought the contract services from the supplier.
[5] Commission staff working document - Evaluation of the Vertical Block Exemption Regulation p. 5.
[6] The Commission does not offer a definition of this term in the Staff Working Document.
[7] Commission staff working document - Evaluation of the Vertical Block Exemption Regulation p. 91.
[8] Commission staff working document - Evaluation of the Vertical Block Exemption Regulation p. 157.

decisions on what to buy. Information exchange can also reduce the welfare of the consumers, though, when it allows competing companies to create, monitor and stabilize oligopolies and cartels.[9]

This raises questions. Mainly, are there any issues from a legal certainty perspective with the way information exchange in dual distribution scenarios is treated in EU Competition law and how should information exchange in dual distribution scenarios be treated to increase the legal certainty?

1.1 Purpose and research questions

The purpose of this thesis is to discuss the legal certainty issues that might arise from the way EU Competition law treats information exchange in dual distribution scenarios today and how this type of information exchange should be treated in the future to increase legal certainty. Because of this, the main research questions are:

- What issues, from a legal certainty perspective, can be identified with the way information exchange in dual distribution scenarios is treated in EU Competition law today?
- How should information exchange in dual distribution scenarios be treated in EU Competition law in the future, in order to increase legal certainty?

In order to answer the two main questions there are three sub questions:

- When are dual distribution scenarios, and information exchange between the parties in such a scenario, covered by the VBER? What EU Competition law rules apply when they are not?
- What distinguishes horizontal agreements and horizontal information exchange, and what EU Competition law rules apply?
- What distinguishes vertical agreements and vertical information exchange, and what EU Competition law rules apply?

[9] Whelan p. 823, 826–827.

1.2 Delimitations and scope

The target of this thesis is EU Competition law. Because of this, national Member State law is only mentioned if it happens to be relevant in a particular case.

The de minimis notice concerns agreements which may have as the effect the prevention, restriction or distortion of competition in the internal market. The notice explains that the Commission does not consider certain restrictions to be appreciable restrictions of competition if the market shares of the parties involved do not exceed certain percentages.[10] The notice is not applicable with regard to by object restrictions and it is not binding for courts or national competition authorities, but can be used as guidance.[11] For the purpose of this thesis it is presumed that the trade between Member States is affected and that the effect is appreciable. The de minimis notice is therefore not further discussed in the thesis. Furthermore, the discussions on the definition of geographical markets and product markets are left out of this thesis.

Private labels are similar to dual distribution scenarios in that they can turn a supplier and a retailer into competitors. However, while dual distribution turns them into competitors on the retailer's market, private labels turns them into competitors on the supplier's market.[12] Despite their similarity, private labels are left out of this thesis.

1.3 Methodology

The EU is its own legal order under the rule of law and therefore has its own sources of law doctrine.[13] The different sources of law within the EU legal order can be divided into primary, secondary and tertiary sources. The

[10] De minimis notice para. 3.
[11] De minimis notice para. 2. 5 and 13.
[12] Gilo p. 140–141.
[13] Van Gend en Loos; Reichel p. 109 and p. 122.

primary sources are the treaties: the Treaty of the European Union (the TEU) and the Treaty on the Functioning of the European Union (the TFEU), as well as the EU Charter of Fundamental Rights (the Charter). Regulations and directives on the other hand are secondary law. Both primary and secondary instruments are examples of *hard law*, but over the years there has also emerged *soft law* or *tertiary instruments* in the EU.

Senden makes a distinction between pre-law guidance instruments, post-law administrative instruments and para-law policy steering instruments.[14] The pre-law instruments are preparatory and informative, often in the form of for example Green Papers and White Papers. Post-law administrative documents are according to Senden both administrative decision-making and single-case decision-making. Typical post-law administrative documents are communications, notices, guidelines, codes, and circulars. Para-law instruments seek to influence Member States and other involved parties to realise regulatory or policy goals, without imposing legally binding obligations, often in the form of conclusions, declarations, resolutions and codes of conduct from the Council, but also in the form of recommendations from the Council or the Commission.[15] Soft law instruments play an important part in EU competition law. The vertical guidelines are a notice from the Commission, and the guidelines on horizontal co-operation agreements (the horizontal guidelines) are a communication from the Commission. These documents are examples of soft law that provide guidance and that are analysed in this thesis. The Commission's goal is that the guidelines help companies assess their own agreements under EU competition law.[16] However, the guidelines have been criticized for raising more compliance concerns for companies than they resolve, especially regarding information exchange.[17]

[14] Senden p. 227–229.
[15] Senden p. 230–233 and p. 235.
[16] Vertical guidelines para. 1(3); Horizontal guidelines para. 7.
[17] Vesterdorf & Pouncey p. 52.

The Court of Justice of the European Union (the CJEU) has throughout the years taken a very active role in the development of EU law and in the hierarchy of sources of law in the Union the CJEU caselaw ranks just below the secondary law.[18] When interpreting the law the Court often uses a teleological method of interpretation. The basis for this method can be said to be the doctrine of *effet utile* or, in other words, that the purpose of the legal act should be governing the interpretation of said legal act.[19]

Another important principle guiding the interpretation of EU law is the protection of human rights. According to Reichel the CJEU has developed an extensive protection of human rights based on the fundamental ideas and structures of the Union Treaties, the common constitutional traditions of the Member States and the international conventions that the Member States, and sometimes the Union, are parties of. The European Convention of Human Rights is one such convention and CJEU caselaw regarding human rights is also codified in the Charter.[20] General principles of law are high-ranking sources of law and central to the interpretation of the law. The principles have three main functions: to complement the, often incomplete, legal acts, to guide the interpretation of the secondary legislation and as a benchmark to test the secondary legislation against.[21]

Literature written by legal scholars, while not a *source of law*, can be helpful for the understanding of the law. Hettne et al. argues that the influence of legal literature at the CJEU is less than in many Member States but that analyses and arguments in literature referenced by the parties in a case can affect the judges' decisions.[22] Van Gestel & Micklitz agrees to some extent, stating that literature of jurisprudence is of relative insignificance compared to what is the case in most Member States.[23]

[18] Reichel p. 114–115; Hettne et al. p. 24.
[19] Reichel p. 114–115.
[20] Reichel p. 116–117.
[21] Reichel p. 126–127.
[22] Hettne et al. p. 72–73.
[23] Gestel & Micklitz p. 67.

Hettne et al. also discuss if economic theory could be considered a source of law, especially in competition law as the assessment of the legality of a certain behaviour is based on presumptions that are based in economic theory. Economic theory can both predict the welfare effects of an agreements or behaviour and explain the rationality of a certain behaviour. However, Hettne et al. argues, one should not overstate the importance of economic theory since economic efficiency often is a subsidiary goal in competition law, ranked bellow other socio-political goals. Economic theory therefore has its main impact as the theoretical background for other sources of law.[24]

1.4 Material and state of research

While using the primary and secondary sources of EU law as a starting point for the thesis, the Commission guidelines on vertical and horizontal agreements play a central part in the understanding of the vertical and horizontal aspects of competition. The works by Whish & Bailey, Jones & Sufrin, and Bellamy & Child on their side offer very thorough explanations of EU Competition law and helps with the understanding of EU Competition law as a whole. For the different aspects of EU Competition law and competition in general, several books and articles are used. However, there are primarily two authors that dive deeper into dual distribution: Gilo and Lianos, respectively, in Ezrachi & Bernitz (red.).

Legal certainty has been the target of several works by legal philosophers, but one of the most prominent in Swedish legal tradition is Peczenik. His work forms the basis for the legal certainty perspective in this thesis and his views on legal certainty are discussed in comparison with the views on legal certainty formulated by Aarnio and Raitio.

[24] Hettne et al. p. 73–76.

1.5 Outline

The thesis consists of four main chapters, not including the Introduction (*Chapter 1*) and the Conclusion (*Chapter 6*). In *Chapter 2*, information exchange in the horizontal context, both standalone and ancillary, is explained. The chapter ends with a brief presentation of a few Commission decisions where horizontal information exchange has been present.

Chapter 3 focuses on vertical agreements in general, as vertical information exchange is not an issue very often discussed in legal literature or in Commission guidelines. The chapter also contains a brief presentation of the role of information in two Commission decisions, as well as an explanation on why vertical and horizontal agreements are treated differently in EU Competition law.

Dual distribution scenarios are presented in *Chapter 4* and this chapter explains what dual distribution is and what rules applies to such scenarios. It also contains a presentation of the place for dual distribution in the vertical-horizontal dichotomy that is ever present in Competition law and ends with a decision by the Danish Competition Authority where information exchange was part of a concerted practice in a dual distribution scenario.

Chapter 5 contains a presentation of legal certainty perspectives, as well as discussions on the issues with the present rules on information exchange in dual distribution from a legal certainty perspective and how this should be treated in the future to increase the legal certainty.

2 Horizontal information exchange

Information exchange is often an important part of horizontal cooperation. The main concern with this is that it might lead to a collusive outcome or anti-competitive foreclosure of the market.[25] Information exchange can take place in different contexts and the context affect the way the information exchange is assessed. Either it can be a standalone agreement with information exchange as the main purpose, or it can be ancillary to other types of horizontal co-operation agreements.[26] Below, standalone and ancillary information exchanges are examined in Section 2.1 and 2.2 and a few examples of horizontal information exchange are given in Section 2.3.

2.1 Standalone information exchange

According to Article 101(1) TFEU "[…] all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market[…]" are against Union law. However, subject to Article 101(3) the agreement or concerted practice can be permitted if the requirements in that article are satisfied, the so-called *the efficiency defence*. Below, the concept of concerted practices is explained in Section 2.1.1; the prevention, restriction, or distortion of competition by object or by effect is explained in Section 2.1.2; and the efficiency defence is explained in Section 2.1.3.

[25] Horizontal guidelines, para. 65
[26] Horizontal guidelines, para. 55–56.

2.1.1 Concerted practices

Concerted practices are coordinated practices between undertakings that are not concluded agreements, where the undertakings "knowingly substitute […] the risks of competition, [for] practical cooperation between them which leads to conditions of competition which do not correspond to the normal conditions of the market".[27] With this in mind, what behaviours can be considered concerted practices? Undertakings have the right to adapt themselves to the existing or anticipated conduct of their competitors. However, any direct or indirect contact between competitors where information is disclosed, can be against EU competition law if it reduces or removes the uncertainty on the market, and thereby restricts competition.[28]

Parallel conduct between competitors can be a sign of information exchange between competitors. Still, not all parallel conduct amount to concerted practices. For example, the CJEU stated in *Wood pulp II* that the parallel conduct of quarterly price announcements to users not in itself was an infringement of EU Competition law.[29] Parallel conduct cannot be considered proof of a concerted practice unless a concerted practice is the only plausible explanation for the parallel conduct.[30] However, in *T-Mobile* the Court stated that the exchange of sensitive information in this case removed competitive uncertainties and was to be regarded as a concerted practice pursuing an anti-competitive object. The information that was considered to remove competitive uncertainties in this case concerned the timing, extent and details of planned changes in behaviour on the market.[31]

Furthermore, several meetings between the parties are not necessary for there to be a concerted practice. A single meeting may be enough as long as the undertakings involved remains active on the market and the meeting affords

[27] Suiker Unie, para. 26.
[28] T-mobile, para. 33; Suiker Unie, para. 173–174.
[29] Wood pulp II, para. 64–65 and 126.
[30] Wood pulp II, para. 71.
[31] T-mobile para. 41.

the competing undertakings the opportunity to take account of the information exchanged.[32] The Court even stated, in for example *Dole food,* that if a company takes part in a concerted practice and remains active on the market it is presumed to have taken account of the information exchanged.[33]

Even if the information exchange is unilateral, meaning only one company discloses information to competitors, it can still be deemed a concerted practice. However, if the disclosure is unilateral and genuinely public it will generally not be considered one.[34] Concerted practices imply the existence of reciprocal contacts and when one competitor discloses its future intentions or conduct in the market to another competitor which requests or accepts it, the reciprocity condition is met. In *Cimenteries* the meeting between two competitors was held in private and at the request of the company Lafarge. Its competitor, Buzzi, informed Lafarge on its future intentions on the southern French market. There was nothing in Lafarge's minutes from the meeting that showed that the representatives of the company had made any objections whatsoever on the information from Buzzi. The Court of First Instance stated that if the competitor does not express reservations or objections when information like this is disclosed, the company is considered to have accepted it.[35]

The Court of First Instance has also stated that even if only one party provides information of its intended conduct on the market and the other parties present at a meeting only listen, it is not enough to exclude the possibility of an agreement or concerted practice.[36] This is based on the fact that competitors participating in meetings where strategic information is being shared are bound to take the information in account when determining its own policy for the future.[37] The CJEU on its side has stated that a concerted practice consists both of undertakings concerting with each other *and* subsequent conduct on

[32] T-mobile para 60–62.
[33] Dole food para. 127.
[34] Horizontal guidelines para. 62–63.
[35] Cimenteries para. 1849 and 1886.
[36] Tate & Lyle para. 54.
[37] Rhône-Poulenc para. 123

the market. There must also be a relationship of cause and effect between these two criteria.[38] According to the Court there is also a presumption that competitors taking part in a concerted practice and remaining active on the market also take account of the information exchanged. Especially if it happens regularly over a long period of time.[39] The Commission also states that if a company receives information from a competitor, by mail, electronically or in a meeting, and it does not respond with a clear statement that it does not want such information, the company will be presumed to have accepted the information.[40]

2.1.2 Restrictive by object and by effect

As mentioned in section 2.1 an agreement or concerted practice is illegal if it has the effect or the object to prevent, restrict or distort competition. If a restrictive object, or in other words a restrictive purpose, is proven there is no need to prove any anti-competitive effects caused by the agreement. To determine if an agreement or concerted practice is restrictive by object the content of the agreement, its objectives and the economic and legal context of it should be studied. The nature of the goods or services and the real conditions of the functioning and structure of the market in question are also important to consider.[41] The intention of the parties can also be taken into account but will not necessarily decide the outcome.[42] Information exchange consisting of individualised data regarding future prices or quantities are considered by object restrictive by the Commission as it considers that type of data "by its very nature" restricting competition.[43] This is because these types of information removes or reduces the uncertainty between competitors regarding the timing, extent and details of future changes in conduct on the market.[44] There must not, however, be a direct link between the concerted

[38] Hüls para. 161; Anic Partecipazioni para. 118.
[39] Hüls para. 162; Anic Partecipazioni para. 121.
[40] Horizontal guidelines para. 62.
[41] Dole food para. 117.
[42] Horizontal guidelines para. 24–26; T-Mobile para. 27; Dole food para. 118.
[43] Horizontal guidelines para. 72–74.
[44] Dole food para. 122.

practice and consumer prices for the practice to be considered by object restrictive.[45] Key is the reduction or removal of the degree of uncertainty as to the parties conduct on the market in question with the result of restriction of competition between them.[46]

Restrictive effect can be found when the agreement has or is likely to have "an appreciable adverse impact on at least one of the parameters of competition on the market".[47] These parameters are for example price, output, product quality, product variety or innovation. The restricting effect comes from the agreement appreciably reducing the competition between the parties to the agreement or between one of them and third parties, and by reducing the parties' decision-making independence.[48] If the parties can change any of the parameters above in a normally non-profitable way, for example by lowering the quality of products, and still be profitable it is likely that the effects are restrictive. Factors such as the nature and content of the agreement and the degree of market power[49] the parties have will affect their opportunity to change the parameters.

To assess the restrictive effect on the market, a comparison must be made between the actual legal and economic context with the agreement and its alleged restrictions, and the actual legal and economic context absent the agreement.[50] The effect of the agreement depends on the economic conditions on the relevant market, the characteristics of the information and the characteristics of the exchange itself.[51] *Firstly,* factors that are relevant to the evaluation of the economic conditions on the market are market transparency, concentration, complexity, stability in regard to demand and supply and symmetry. A complex market has many differentiated products, which will

[45] T-mobile para. 39; Dole food para. 123.
[46] Dole food para. 121.
[47] Horizontal guidelines para. 27.
[48] Horizontal guidelines para. 27.
[49] "[…] the ability to maintain prices above competitive levels or to maintain output in terms of product quantities, product quality and variety or innovation below competitive levels for a not insignificant period of time." Vertical guidelines para. 97.
[50] Horizontal guidelines para. 28–29.
[51] Asnef-Equifax para. 54.

make it difficult to, for example, coordinate prices. A symmetric market will have companies which are homogenous with regard to their costs, demands, market shares, product range and capacity, which will facilitate collusion.[52] Markets with high transparency, low complexity and low stability are easier for competitors to collude in and information exchange is therefore more likely to be restrictive to competition there. However, the effect of the information on these factors must also be taken into account as it could, for example, stabilize an otherwise instable market.[53]

Secondly, there are several factors that are relevant for the characterization of the information exchanged between the parties. Depending on if the data is strategic; covering large portions of the market; aggregated or individualized; historical or current; frequently exchanged; public or non-public; and if the exchange is made in public or privately, the impact of the information will vary.[54] *Thirdly*, the purpose and the conditions to access and participate in the information exchange are the central characteristics of the information exchange itself.[55] The assessment of the effects is then done on a case-by-case basis.[56]

2.1.3 The efficiency defence

Even if the agreement is found to be restricting competition, it can still be legal if it meets the requirements in Article 101(3) TFEU. If this is the case the agreement is not void. To benefit from the efficiency defence the company must show that the agreement improves the production or distribution of products or promotes technical or economic progress. The company must additionally show that customers are allowed a fair share of the resulting benefit. Furthermore, the agreement must not impose restrictions, which are not indispensable to reach the objectives described above, on the concerned

[52] Horizontal guidelines para. 80 and 82.
[53] Horizontal guidelines para. 77 and 81.
[54] Horizontal guidelines para. 86–94.
[55] Asnef-Equifax para. 54.
[56] Horizontal guidelines para. 75.

undertakings. It must also not afford the undertakings "the possibility of eliminating competition in respect of a substantial part of the products in question.".[57]

Cost-related information can, for example, make companies more effective by providing a benchmark to compare performance against and demand information can allow companies to reduce unnecessary inventory.[58] All aspects, such as subject matter and aggregation of data, must be indispensable in the meaning that it must be of the kind that comes with the lowest risks and not go beyond what is needed to create the claimed efficiency gains.[59] The efficiency gains must be passed on to the consumer to an extent that outweighs the restrictive effects. This is more likely to occur when the parties to the agreement have low market power.[60] These conditions are cumulative and exhaustive, which means that these four conditions need to be fulfilled, no more or less. If the conditions are not fulfilled, the parts of the agreement that are incompatible are null and void. What happens with the rest of the agreement depends on national law.[61]

In *John Deere* the Court of First Instance assessed an appeal of a Commission decision concerning an information exchange system between the major agricultural tractor manufacturers and importers on the UK market.[62] The traders exchanged information on registration of tractors, by which the companies' dealers' activities were allowed to be monitored, imports and exports could be identified, and parallel imports could be monitored. This scheme was deemed likely to reduce intra-brand competition[63] by the Commission, and the Court of First Instance agreed.[64] The agreement allowed

[57] TFEU Article 101(3)(b).
[58] Horizontal guidelines para. 95–96.
[59] Horizontal guidelines para. 101.
[60] Horizontal guidelines para. 103.
[61] Horizontal guidelines para. 34 and 41–42.
[62] John Deere para. 1 and 5.
[63] *Intra*-brand competition, competition between competing retailers of the same brand, should not be confused with *inter*-brand competition, which is competition between competing brands, see for example Gilo p. 143.
[64] John Deere para 49.

complete transparency between the traders, the result of which being that the agreement removed all uncertainty on the market. This leads to a foreclosure of the market for new suppliers.[65] The Court of First Instance also stated that in a truly competitive market transparency increases competition. However, the market in this case was oligopolistic and the information exchange restricted the traders "ability to make independent decisions in ways which may have consequently affected the competition between those traders".[66]

2.2 Ancillary information exchange

If exchange of information is not the main purpose of the agreement or concerted practices it is considered ancillary to the main restraints and its negative effects should then be assessed in the context of the main agreement, not separately. The assessment of the information exchange should be made in accordance with the guidelines for standalone information exchange. [67] Examples of such agreements are for example R&D agreements, production agreements, purchasing agreements and commercialisation agreements.[68] In these types of agreements, as with the standalone agreements, the exchange of sensitive information can result in the coordination of the parties' behaviour and a collusive outcome.[69] If the information exchange does not exceed what is necessary for the legitimate purpose of the agreement however, it is more likely to be accepted under Article 101(3) TFEU.[70]

[65] John Deere para. 47–48.
[66] Quote in John Deere para. 66; see also John Deere para. 51 and 78.
[67] Horizontal guidelines para. 56, 181 and 216.
[68] Horizontal guidelines para. 111, 150, 190, 225.
[69] Horizontal guidelines para. 114, 147, 158 and 175.
[70] Horizontal guidelines para. 182 and 216.

2.3 A brief presentation of horizontal information exchange in practice

Information exchange is often a crucial part of horizontal collusion. Lubambo explains that the three most important challenges of collusion are identifying a mutually beneficial strategy and outcome; monitoring adherence and detecting deviation; and punishing deviations.[71] All these challenges can be overcome by increasing transparency or, perhaps more effectively, direct information exchange. Below, three Commission decisions are briefly presented to show examples of what types of information are exchanged in cartel situations to overcome the challenges related to collusion.

The *Mushrooms* decision concerned companies involved in the canned mushrooms industry. In order to stabilise market shares and stop the decline of prices they colluded in a non-aggression pact where they exchanged confidential information concerning tenders, stock levels, prices, customers and negotiations with clients.[72] In *Smart card chips*, four companies including Samsung and Philips coordinated their market behaviour by exchanging competitively sensitive information regarding price intentions, production processes, internal capacity allocation, capacity utilisation, actual inventory status and the likelihood of acceptance of contractual clauses.[73] Similarly, in *Rechargable batteries* Samsung, Sony and two other companies exchanged sensitive market information concerning the usage of production capacity, supply and demand forecasts, planned investments in new production lines, market trends, price forecasts and sales results.[74]

[71] Lubambo p. 136.
[72] Mushrooms, para. 26, 32, 45, 47 and 53.
[73] Smart Card Chips, para. 1, 63, 72 and 73.
[74] Rechargeable batteries, para. 1 and 27.

3 Vertical information exchange

In most cases information exchange in a vertical context is not anti-competitive in the sense of Article 101(1). This is true even if the agreement requires the distributor to provide the supplier with different kinds of information, for example on sales trends, stocks or discounts granted. However, it may be anti-competitive if the supplier uses the information to influence what markets the distributors resell the products on or at what price the products are sold. The supplier may furthermore not be allowed to use the information to identify and stop parallel imports and it is forbidden to provide other of the supplier's distributors with the information.[75]

The vertical guidelines, contrary to the horizontal guidelines, give no guidance on information exchange in vertical relationships, and vertical information exchange is not often discussed in legal literature. Because of this, Section 3.1 focuses on different types of vertical agreements and clauses to give context to vertical information exchange, Section 3.2 describes how the assessment of a vertical agreement is conducted and Section 3.3 briefly presents a few examples of vertical information exchange in practice. Section 3.4 describes vertical agreements with horizontal effects and Section 3.5 explains why vertical and horizontal agreements are treated differently in EU Competition law.

3.1 Vertical agreements and clauses

There are several types of distribution models where exclusivity is central. An *exclusive distribution agreement* is an agreement where the supplier

[75] Bellamy & Child p. 530–531.

agrees to only sell its products to one distributor for resale in a geographical area. The distributor in turn agrees to not actively sell those products in other areas.[76] If the agreement instead concerns a particular group of customers the agreement is called *exclusive customer allocation*.[77] In both cases agreements are exempted by the VBER if both the supplier's and the distributor's market shares do not exceed 30 %.[78] The Commission considers the main competition risks for these kinds of agreements to be price discrimination caused by reduced intra-brand competition and market partitioning.[79] A reduction of intra-brand competition will most likely not be damaging to consumers, as long as the inter-brand competition is strong.[80]Another type of exclusivity agreement that, combined with an exclusive distribution agreement, pose a risk to competition is the *exclusive sourcing agreement*. This means that the distributor agrees to only buy a product from the manufacturer and not from other distributors within the exclusive distribution network.[81]

In contrast, in a *selective distribution agreement* the supplier limits the number of distributors in a geographical area based on selective criteria that is linked to the nature of the product. The criteria can include training of sales personnel, service provided at the sales, and a certain range of products being sold. This is called qualitative selective distribution because the criteria are purely qualitative. Sometimes quantitative criteria are added, for example requiring minimum or maximum sales or fixing the number of retailers. Often sale to others than the selected distributors or end-customers is restricted.[82] This type of agreement is mostly used for sophisticated consumer products, such as products requiring technical expertise or products with a luxury image. Hence, they are almost always branded final products.[83] The

[76] Vertical guidelines para. 151.
[77] Vertical guidelines para. 168.
[78] VBER Article 2(1) and 3(1).
[79] Vertical guidelines para. 152 and 169.
[80] Vertical guidelines para. 102 and 153.
[81] Vertical guidelines para. 162.
[82] Vertical guidelines para. 174–175.
[83] Bellamy & Child p. 533.

Commission identifies a reduction of intra-brand competition to be one of the main competition risks of this kind of agreement.[84]

Resale Price Management (RPM) in the form of agreements or concerted practices having as their indirect or direct objective to establish a fixed minimum resale price or price level are considered hardcore restrictions and are not exempted by the VBER. Instead, they are presumed to restrict competition and not fall under the efficiency defence under Article 101(3).[85] The Commission considers RPM to pose competition risks in several ways. Among other things it may soften competition or facilitate collusion between suppliers and between distributors and it has the direct effect of increasing resale prices. RPM can also be used by a producer to foreclose smaller rivals from the market and generally reduce dynamism and innovation at the distribution level.[86] There are however exceptions where RPM can be acceptable under the efficiency defence in Article 101(3). This is for example when a new product is introduced or for the purpose of a coordinated low-price campaign. Furthermore, recommended resale prices and maximum resale prices are exempted by the VBER if both the producer's and the distributor's market shares do not exceed 30 %.[87] Another type of pricing-related agreement is the *Most Favoured Nation-clause* (MFN-clause), meaning that, for example, the supplier agrees not to treat a distributor less favourably than its competitors.[88] MFN-clauses may reduce intra-brand competition and make market-entering more difficult.[89]

Tying is a form of agreement where customers buying one product are also required to buy another distinct product. In a vertical agreement this kind of clause may result in a single branding type obligation for the tied product, the product tied to the main product.[90] Tying might lead to foreclosure of the

[84] Vertical guidelines para. 175.
[85] Article 4(a) VBER; Vertical guidelines para. 223.
[86] Vertical guidelines para. 224.
[87] VBER Article 3(1); Vertical guidelines para. 225 and 226.
[88] Jones & Sufrin p. 740.
[89] Bellamy & Child p. 492.
[90] Vertical guidelines para. 214.

market and increased prices but is exempted by the VBER if the market shares of each of the parties involved do not exceed 30 %.[91] *Upfront access payment* is sometimes used by distributors to let suppliers have access to their distribution network by paying upfront. It is exempted by the VBER if both the distributor and supplier have market shares not exceeding 30%, even though the competition risks of this type of agreement is foreclosure of other distributors, as well as effects similar to exclusive supply agreements. Other risks are foreclosure of other suppliers, softening of the competition and facilitation of collusion between distributors.[92]

Category management agreements set out the supplier to be trusted with the marketing of a category of products, even products by competing suppliers in the same category. This may cause a distortion of the competition between suppliers, with an effect comparable to that of a single branding obligation.[93] However, it can also facilitate collusion and enable suppliers to exchange information on future pricing, promotional plans or advertising campaigns through the distributor.[94] This type of agreement is exempted by the VBER if the market shares of both supplier and distributor respectively do not exceed 30 %.[95]

A *single branding agreement* can be several kinds of agreements. The common denominator that the main element is that the distributor is obliged or induced to get all products of a certain type from one supplier. One example of this is the *non-compete agreements* which stipulate that the distributor agrees to buy more than 80 % of a type of product from the supplier. Another example is *quantity forcing*, which the Commission considers to be a weaker form of non-compete clause. This kind of agreement can contain minimum purchase requirements or stocking requirements. The so-called *English clause* can be expected to have similar effects as a single branding obligation.

[91] VBER Article 2(1) and 3(1); Vertical guidelines para. 216-218.
[92] Vertical guidelines para. 203–206.
[93] Vertical guidelines para. 209–210.
[94] Vertical guidelines para. 212.
[95] VBER Article 2(1) and 3(1).

This clause requires the distributor to report any better offers from other suppliers and only lets the distributor accept those offers if the supplier does not match them.[96] The possible competition risks according to the Commission are foreclosure of competing suppliers, softening of the competition on the market, loss of in-store inter-brand competition and facilitation of collusion on the supplier level, as information on the prices and quantities of the suppliers competitor can be exchanged.[97] The VBER exempts single branding agreements if neither the suppler nor the distributor has a market share that exceeds 30 %. For non-compete agreements there additionally must be a five-year time limit for them to be exempted.[98]

Vertical integration is not a type of vertical agreement per se. Instead, it means that a company operates at more than one level of trade, for example it both manufactures a product and sells that product directly to the end customer. It can make it more difficult to only access one of the levels of trade and there is a risk that vertically integrated firms will favour its own downstream operations over its other distributors.[99]

3.2 Assessment of vertical agreements

The assessment of the legality of vertical agreements consists of several steps and the Commission encourages companies to do their own assessment before entering into an agreement.[100] To help in this the Commission has published the vertical guidelines. Assuming that the companies are not exempted from Article 101 TFEU because of lack of appreciable effect on the trade between Member States or because they are not small or medium-sized companies, the general conditions of the VBER must be met in order for the agreement to benefit from the block exemption. The Commission will in most cases refrain

[96] Vertical guidelines para. 129.
[97] Vertical guidelines para. 130.
[98] VBER Article 2(1), 3(1), 5(1)(a); see also Vertical guidelines para. 131.
[99] Vertical guidelines para. 117; Jones & Sufrin p. 131.
[100] Vertical guidelines para. 96.

from opening proceedings regarding small or medium-sized companies entering vertical agreements the Commission even if the agreements meet the conditions set up in Article 101(1).[101]

The general conditions that must be met in order to benefit from the VBER are that the companies entering into an agreement must not have market shares exceeding 30 %, and that the agreement itself must not contain any excluded or hardcore restrictions. The excluded restrictions mainly concern different types of non-compete clauses. If these conditions are met, the agreement is most likely exempted from Article 101.[102] If the market shares exceed 30 % there might be a risk that the market shares are large enough for Article 102 on abuse of a dominant market position to be applicable.[103]

Even if a vertical agreement falls outside of the scope of the VBER it is not presumed to fall within the scope of Article 101(1). Instead, the Commission bears the burden of proof that the conditions of Article 101(1) are met. The basis for the Commission's assessment of this is explained further in Section 3.2.2. If the agreement is found to fall within the scope of the article it is still possible for the company to demonstrate pro-competitive effects, according to Article 101(3). This the company bears the burden of proof for.[104] The case when an agreement falls within the scope of the VBER but contains hardcore restrictions is explained in Section 3.2.1 below.

3.2.1 Hardcore and by object restrictions

Hardcore restrictions are restrictions by object and they are presumed to be covered by Article 101(1) and not meet the requirements of Article 101(3), which means that that they are not exempted by the VBER.[105] As explained in Section 2.1.2 by object restrictions have as their object the prevention,

[101] Vertical guidelines para. 11; De minimis notice para. 8.
[102] VBER Article 2, 3(1), 4 and 5.
[103] Whish & Bailey p. 643.
[104] Vertical guidelines para. 96–97.
[105] Vertical guidelines para. 23 and 47; Jones & Sufrin p. 736.

restriction or distortion on competition on the internal market.[106] By object restrictions are distinguished from by effect restrictions and the assessment of them are made in different ways. However, both types of restrictions can satisfy the conditions of Article 101(3).[107] The content of the agreement, the objective aims pursued by it, the context in which it is to be applied and the actual conduct of the parties on the market are all factors that the Commission will look at when assessing if an agreement is by object restrictive. If the actual implementation is restrictive by object, the agreement may be deemed so too, even though its provisions do not expressly state so.[108]

Even if the restrictions are hardcore restrictions, it is still possible to use the efficiency defence under Article 101(3) and demonstrate pro-competitive effects.[109] If the undertaking substantiates "that likely efficiencies result from including the hardcore restriction in the agreement" and demonstrates that the conditions of the article are fulfilled, the Commission "will be required to effectively assess the likely negative impact on competition before making an ultimate assessment of whether the conditions of Article 101(3) are fulfilled" rather than presuming that to be the case.[110]

According to the VBER, hardcore restrictions are direct or indirect RPM; partitioning of the market by territory or customer group; restricting a distributor in a selected distribution network from active or passive sales to end users or other distributors within the selective distribution network; and restriction or prevention of manufacturer's sale of spare parts to end users, independent repairers and service providers.[111]

[106] TFEU Article 101(1).
[107] Horizontal guidelines para. 19–22
[108] Horizontal guidelines para. 22.
[109] Vertical guidelines para. 47.
[110] Vertical guidelines para. 47.
[111] Vertical guidelines para. 48–59

3.2.2 The effects of vertical restraints

If the vertical agreement is found not to fall under the VBER the assessment will be made under Article 101(1) TFEU. For by object restrictions a similar assessment to the one regarding horizontal agreements is made, see Section 2.1.2. If there are no by object restrictions, there might still be by effect restrictions and as the effects of vertical restraints differs from horizontal restraints this will be explained in more detail below. To be relevant the restriction must cause negative actual or potential effects to competition on the relevant market.[112] This effect must also be appreciable.

When assessing the effect there are some factors that are deemed particularly relevant by the Commission. These are the nature of the agreement; the market positions of the parties; their competitors and the buyers of the contract products; the entry barriers on the market; the maturity if the market; the level of trade; the nature of the product; and other potential factors.[113] The *nature of the agreement* refers to the type of restraints the agreement results in, the duration of the restraints and how much they affect the total sales on the market.[114]

The *market positions* are generally assessed by looking at market shares and other competitive advantages, such as holding essential patents or superior technology. With the *buyers of contract products*, it is the buyers' positions on the resale market that are important. For example, if they have their own brands and their brand image with end customers.[115] If companies already present at the market in question can increase their prices above a competitive level and still no new companies are attracted to the market within a few years it is an indication of high *entry barriers*. If the entry can be made within two years, and thus make the price increases unprofitable, that is a sign of low

[112] Horizontal guidelines para. 24.
[113] Vertical guidelines para. 111.
[114] Vertical guidelines para. 113.
[115] Vertical guidelines para. 114–116.

entry barriers.[116] The *market maturity* is connected to how old the market is and the *level of trade* is connected to whether the products are intermediary or final products as the customers buying those types of products generally belong to different groups.[117]

The *nature of the products* is linked to how expensive the product is in general, and in relation to the typical customer's budget; if the product typically is bought repeatedly or not; and if the products on the market are more homogeneous or heterogeneous.[118] Apart from the factors linked directly to the particular restraints in the actual case, *other factors* may have to be taken into account. These are for example, if the market is highly covered by other similar agreements, whether the restrictions mainly target one of the parties to the agreement, the regulatory environment and if it seems likely that collusion will occur or be facilitated.[119] The assessment of whether there is a restrictive effect on competition is a comparison of the actual or likely future situation on the relevant market with the vertical restrictions in place with what the situation would be like without those vertical restrictions.[120]

3.2.3 The efficiency defence in a vertical context

If the pro-competitive effects in the form of efficiencies outweigh the anti-competitive effects of a vertical restraint, it might be permitted under Article 101(3) TFEU. As mentioned in Section 2.1.3, the requirements under the article are that there are objective economic benefits; that the restraints are indispensable to attain those benefits; that consumers get a fair share of the efficiency gains; and that the agreement must not afford the parties the

[116] Vertical guidelines para. 117.
[117] Vertical guidelines para. 118–119.
[118] Vertical guidelines para. 120.
[119] Vertical guidelines para. 121.
[120] Vertical guidelines para. 97.

possibility of eliminating large parts of the competition on the relevant market.[121]

The objective benefits can often be gained from various different types of restraints as they most often are substitutable. Exclusive or selective distribution agreements, or similar, may help against several types of issues that may arise. Other distributors free-riding on the distributor's promotion efforts is such as issue. Exclusive or selective distribution agreements might also be vital if a manufacturer wants to introduce a new product to a retailer known for its high-quality products. This is because such a retailer might not want to sell the product if it also turns up at other, less exclusive, retailers. The products that this is relevant for are most likely complex goods that represent a relatively large purchase for the final consumer. Selective distribution or franchising may be beneficial as it can help build an attractive brand image by helping to enforce uniformity and quality standardisation.[122]

Non-compete type restraints can help against free-riding on the supplier level. For example, suppliers sometimes invest in promotion at the retail level and that might attract customers to its competitors. Non-compete clauses may also be justified when know-how is provided from the supplier to the buyer, that the buyer did not already have access to and that is substantial and indispensable for the operation of the agreement.[123]

Territorial protection of different kinds might be beneficial when a manufacturer wants to enter a new geographical market as that security might be demanded from the distributor in order for it to agree to make the investment in the new product. Setting a maximum resale price may help against the *double marginalisation problem*.[124] This problem arises when both the manufacturer and the retailer sets prices to maximise their own profits, resulting in a price that is higher than the price a profit-maximising

[121] Vertical guidelines para. 122.
[122] Vertical guidelines para. 107(1), 107(3), 107(9) and 109.
[123] Vertical guidelines para. 107(1) and 107(5).
[124] Vertical guidelines para. 107(2) and 107(6).

vertically integrated manufacturer would set.[125] Would the retailer lower its resale price, the sales might increase, and this is something that the manufacturer benefits from. Setting a maximum resale price is therefore helpful.[126]

Indispensability in the case of a vertical agreement means that the parties must explain and demonstrate why alternative, seemingly realistic and significantly less restrictive agreements would be significantly less efficient. The efficiencies in the production, purchase and/or resale of the contract products with the restraints are compared to what would have been without the same restraints. The Commission will consider the market conditions and realties facing the parties when making the assessment.[127]

Consumers getting a fair share means that consumers must at least be compensated for the negative effects on competition. In regard to the risk of a vertical agreement eliminating competition, the Commission notes that this part of Article 101(3) must be read together with Article 102 on abuse of dominant market position. A restrictive agreement which maintains, creates or strengthens a market position approaching a monopoly can normally not be justified on the grounds that it also creates efficiency gains. This is because the interest of protecting the rivalry and the competitive process on the market outweighs almost all efficiencies.[128]

[125] Barton & Wang p. 868.
[126] Vertical guidelines para. 107(6).
[127] Vertical guidelines para. 125.
[128] Vertical guidelines para. 126–127.

3.3 Breif presentation of information exchange in vertical agreements in practice

Vertical agreements are not often the target of the Commission's investigations, and information exchange is even less often part of the investigated vertical restraints. However, examples of how information can be used to implement vertical restraints can be found in the *Pioneer* and *Denon & Marantz* decisions from 2018. Pioneer sent information on recommended resale prices and market prices to retailers in order to pressure them to increase the sales prices.[129] Denon & Marantz sent information to retailers concerning recommended resale prices and street prices of products. The company also sent information to retailers in its distribution network on alleged sanctions that were imposed on the other retailers because of aggressive pricing. This was done to increase the over-all resale prices.[130]

The information in these cases was unilaterally provided in order to pressure the distributors to increase their resale prices. While resale price maintenance is restrictive by its very nature, the restraints were still vertical and therefore considered less damaging than horizontal agreements. This in turn affected the calculation of the fines.[131]

3.4 Vertical agreements with horizontal effects

Lubambo argues that the dichotomy of horizontal and vertical is dangerous, as it ignores the horizontal effects that vertical restraints might have.[132]

[129] Pioneer para. 59.
[130] Denon & Marantz para. 39, 48 and 58.
[131] Pioneer para. 185; Denon & Marantz para. 125.
[132] Lubambo p. 141–142.

Especially two types of agreements that are traditionally seen as vertical, agency agreements and hub and spoke arrangements, can have horizontal effects. Similar to dual distribution scenarios in that aspect, they blur the line between vertical and horizontal agreements.

An agent is defined, by the Commission, as a legal or physical person who has the power to negotiate and/or conclude agreements for the sale or purchasing of goods or services on the behalf of a principal. This can be made in the agent's name or in the principal's name.[133] If the agent's selling or purchasing activities are part of the principal's activities and commercial and financial risks, the agency agreement will normally fall outside of the scope of Article 101(1) TFEU.[134] However, agents can be used by principals as a way to exchange sensitive market information between them, with the agent as the middleman.[135]

This practice is similar to hub and spoke arrangements where a distributor or a supplier acts as a hub for two or more suppliers or distributors to share information.[136] In these cases the vertical elements reinforce the horizontal coordination.[137] To avoid being accused of colluding in such a way, it is important for a supplier to negotiate separately with all its distributors.[138] Even unilateral exchange of information through a hub and spoke arrangement is capable of violating EU competition law.[139] Amore has criticized antitrust enforcers for not fully taking into account that hub and spoke arrangements are neither "indirect information exchange nor […] vertical conduct with some horizontal effects or vice versa" and thereby ignoring the full impact of this type of arrangement.[140]

[133] Vertical guidelines para. 21.
[134] Vertical guidelines para. 18.
[135] Vertical guidelines para 20.
[136] Lubambo p. 139–140;
[137] Prewitt & Fails p. 64.
[138] Whish & Bailey p. 676; Horizontal guidelines para. 55.
[139] Whelan p. 843.
[140] Amore p. 30.

An example of collusion being facilitated by an agency agreement is found in the Commission's decision in *E-books*. In this case five publishers were dissatisfied with Amazon, which they had wholesale agreements with, lowering the retail prices of e-books and started discussing different ways to increase the price. Not long after, Apple reached out to the publishers on an individual basis and informed them of its intention to start selling e-books. The publishers discussed the offer with each other and a few of them proposed an agency model to Apple, which Apple later agreed to adopt. The terms of the agreements with the different publishers were identical and included an MFN clause and a maximum retail price clause. During the negotiations Apple informed at least five publishers of the status of the other negotiations and the publishers kept in direct contact during this time as well.[141] After signing with Apple the publishers let Amazon know that they intended to change the wholesale-model to an agency model. Amazon refused initially but later accepted the terms.[142] This all took place in the US, but later on the five publishers concluded similar agreements in the UK, Germany and France; first with Apple and then with Amazon.[143] According to the Commission this resulted in increased retail prices in the EEA.[144]

3.5 Why vertical and horizontal agreements are treated differently

The Commission considers vertical agreements in general to be less harmful to competition than horizontal agreements. It is also more likely that vertical agreements may provide substantial efficiencies.[145] According to the Commission this is mostly because the restraints to competition caused by horizontal agreements may concern identical or substitutable goods and

[141] E-books para. 31–39.
[142] E-books para. 43
[143] E-books para. 48–49, 58, 62 and 66
[144] E-books para. 67–68.
[145] Vertical guidelines para. 6.

services.[146] However, in vertical agreements there is still a risk that companies might try to increase their profits at the expense of direct competitors by raising their costs.

When it comes to information exchange in vertical agreements the Commission is mostly concerned that the information will be used to facilitate horizontal collusion, for example by using agency agreements and category management to facilitate horizontal collusion. Other than that, the Commission does not look more closely into the positive and negative effects of information exchange in vertical relationships. Instead, it focuses on the positive and negative effects of vertical restraints in general.[147] The negative effects of vertical restraints are anti-competitive foreclosure, the softening of inter-brand and intra-brand competition and the creation of obstacles to market integration.[148] The positive effects on the other hand are for example the promotion of non-price competition and improved quality of services, as well as the optimization of manufacturing and distribution processes.[149]

Horizontal information exchange can also have positive effects. Such information can benefit companies by giving them a way to benchmark against best practices, and demand and cost information can allow for cost savings as companies can allocate production towards high-demand markets.[150] Information exchange can also benefit the consumers. Exchange of consumer data can reduce consumer lock in, especially in insurance and banking. Past and present market shares can signal quality, and genuinely public and current information can be relevant for the consumers' purchasing decisions.[151] Present and past information is more likely than information on future conduct to have the kind of positive efficiency effects that is part of the evaluation under Article 101(3) TFEU.[152]

[146] Vertical guidelines para. 98.
[147] Vertical guidelines para. 20 and 212.
[148] Vertical guidelines para. 100.
[149] Vertical guidelines para. 106.
[150] Horizontal guidelines para. 95–96.
[151] Horizontal guidelines para. 97–99.
[152] Horizontal guidelines para. 100.

The negative effects stemming from horizontal information exchange are primarily a collusive outcome and anti-competitive foreclosure of the market. The artificial transparency caused by the information exchange facilitates coordination which has restrictive effects on competition.[153] Information on future conduct can help companies to reach a common understanding on the terms of the coordination and no explicit agreement is then needed.[154] Information on past and present conduct can increase the internal and external stability of a collusive outcome as it allows the parties to monitor deviations among the colluders and retaliate against them. It also allows the parties to monitor companies trying to enter the market and target them.[155] The anti-competitive foreclosure of the market stems from unaffiliated and law-abiding companies suffering a significant disadvantage. However, to actually foreclose the market to that extent the information must be of very strategic importance and cover a significant part of the relevant market.[156] Information exchange can also result in foreclosure of third parties in related upstream or downstream markets. For example, a vertically integrated manufacturer can increase the price for competitors downstream by raising the price of a key component.[157]

According to Gilo there are two reasons for the less harsh treatment of vertical restraints. The first reason is that the parties in a vertical relationship "can use the legitimate terms of their contract to achieve anticompetitive effects even in the absence of vertical restraints".[158] If the supplier wants higher retail prices for example, it can induce the retailers to increase the retail price simply by increasing the wholesale price, Gilo explains. This way of achieving anticompetitive outcomes by legitimate means does not exist in scenarios with two competitors. Instead, they need to organise cartels or

[153] Horizontal guidelines para. 65.
[154] Horizontal guidelines para. 66.
[155] Horizontal guidelines para. 67–68.
[156] Horizontal guidelines para. 69–70.
[157] Horizontal guidelines para. 71.
[158] Gilo p. 141.

similar practices to achieve it.[159] The second reason is that the exercise of market power by one party most likely will hurt the demand for the product at the other party's level of distribution. Vertical restraints of different kinds can because of this be used to alleviate inefficiencies in distribution or supply and this might benefit customers in the end.[160]

[159] Gilo p. 141.
[160] Gilo p. 142–143.

4 Dual distribution scenarios and information exchange

Vertical agreements between competitors are not exempted by the vertical block exemption. There is an exception, though, for agreements "where competing undertakings enter into a non-reciprocal vertical agreement and: (a) the supplier is a manufacturer and a distributor of goods, while the buyer is a distributor and not a competing undertaking at the manufacturing level;".[161] In other words, non-reciprocal agreements in dual distribution scenarios fall under the VBER.[162] This type of agreement is exempted by the VBER under the same requirements as the other exempted agreements: the supplier must not have a market share exceeding 30 % of the market where it sells the products and the distributor must not have a market share exceeding 30 % on the market where it buys the products.[163] Another requirement is that the agreement does not contain any hardcore restrictions.[164]

In cases other than the non-reciprocal agreements described above the vertical aspects of the agreement are assessed under the vertical guidelines, while the horizontal aspects are dealt with in the horizontal guidelines.[165] The Commission has further stated in the vertical guidelines that "[i]n case of dual distribution it is considered that in general any potential impact on the competitive relationship between the manufacturer and retailer at the retail level is of lesser importance than the potential impact of the vertical supply agreement on competition in general at the manufacturing or retail level."[166] The necessary prerequisite "non-reciprocal agreement" is interpreted in Section 4.1 and the effects of dual distribution is presented in Section 4.2. In

[161] Article 2(4) VBER.
[162] Note that the term *agreement* in the VBER includes concerted practices, see Article 1(1)(a) VBER; Article 2(4) VBER.
[163] Article 3 VBER.
[164] Article 4 VBER.
[165] Vertical guidelines para. 27.
[166] Vertical guidelines para 28.

Section 4.3 dual distribution in Commission decisions is discussed and finally, in Section 4.4 the Danish Hugo Boss decisions which concerned information exchange in dual distribution scenarios are presented.

4.1 The meaning of ”non-reciprocal agreements” in Article 2(4)

The first question that arises when reading Article 2(4) VBER concerns what a non-reciprocal agreement is, as there are no definitions in the VBER, in the guidelines or in any dual distribution related caselaw. According to the Cambridge Dictionary, a reciprocal agreement is an agreement ”involving two people or organizations who agree to help each other by behaving in the same way or by giving each other similar advantages”.[167] The term reciprocity is not foreign to EU Competition law. In regard to information exchange the Court of First Instance expressed in *Cimenteries* that reciprocity is essential for there to be a concerted practice. Conversely a truly unilateral provision of information by one party to a second, completely passive, party is not considered a concerted practice. The party receiving the information is not considered passive though, if it requests or accepts the information. By requesting the meeting and not making any reservations or objections when given the information, the receiving party in *Cimenteries* was deemed to have expressed acceptance, according to the Court.[168]

The conclusion based on this definition is that there is no reciprocity in situations with truly unilateral provision of information to a completely passive party. However, those situations are not considered to qualify as concerted practices, and if there is not even a concerted practice, how could there be an agreement? At the same time reciprocity is achieved if the party receiving information accepts it, and the party is considered to have accepted it if it does not object to the information and remains on the relevant market.

[167] Definition of *reciprocal* from the Cambridge Business English Dictionary.
[168] Cimenteries para. 1848–1850.

Article 2(4) VBER does not only apply to information exchange, though, and this definition is more difficult to apply to a vertical restraint like a maximum resale price. If the agreement must be non-reciprocal and it turns reciprocal as soon as the distributor accepts the maximum resale price, then no agreements would ever fall under Article 2(4).

The term non-reciprocal agreement is used in other guidelines from the Commission. In relation to technology transfer agreements the Commission says: "[a] non-reciprocal agreement is an agreement where only one of the parties is licensing its technology rights to the other party or where, in the case of cross licensing, the licensed technologies rights are not competing technologies and the rights licensed cannot be used for the production of competing products".[169] This indicate that Article 2(4) applies to agreements where the obligations of the agreement are one-sided.

As mentioned in the introduction the current VBER is the second version of the vertical block exemption and just like the second one, the first version of the VBER had related guidelines written by the Commission.[170] In these older guidelines there is a definition of non-reciprocal agreement: "non-reciprocal means, for instance, that while one manufacturer becomes the distributor of the products of another manufacturer, the latter does not become the distributor of the products of the first manufacturer".[171] This definition is not present in the new version of the guidelines, which means that the Commission for some reason removed it in the last renewal process. Because of this it should not be held as the current definition of the term. It does however suggest that the non-reciprocity means that two manufacturers cannot come to an agreement to distribute each other's products and enjoy the exemptions from Article 101 TFEU that the VBER offers. If this is the case, then why is the same thing expressed in Article 2(4)(a)? As mentioned above, that part of the article says that a requirement to fall under the article is that

[169] Technology transfer guidelines para. 98.
[170] Guidelines on Vertical Restraints (2000/C 291/01).
[171] Guidelines on Vertical Restraints (2000/C 291/01 para. 27.

"the supplier is a manufacturer and a distributor of goods, while the buyer is a distributor and not a competing undertaking at the manufacturing level". In summary, it is not easy to understand what the Commission means with the term "non-reciprocal agreement". This raises legal certainty concerns that will be discussed in Section 5.2.

4.2 The effects of dual distribution

When the supplier is also a retailer its incentives are changed. In these cases, the supplier suddenly may benefit from eliminating competition on the retailer level as it can benefit from it in a way that is similar to a horizontal situation. According to Gilo, the anticompetitive effect might still not be the same as in a purely horizontal restraint, but it might be stronger than with purely vertical restraints.[172] Depending on whether the supplier's profit comes from the wholesale price per unit or from fixed fees the anticompetitive effect differs, as the anticompetitive effect of dual distribution gets stronger the more the profit depends on the wholesale price. This is because in the cases where the profit is based on fixed fees, the incentive to increase the supplier's own sales at the cost of the sales at the retailers is lower. The retailers' willingness to pay these fees depends on their own profit, the higher the profit, the higher their willingness to pay a higher fee.[173]

Some vertical restraints, for example minimum resale price maintenance, can normally only be explained by the need to improve efficiency in distribution, as it would not be beneficial for a supplier to eliminate price competition among its retailers. In dual distribution scenarios this is not the case, however. Instead, the relationship of the supplier and distributors has effects that are similar to the effects of a price fixing cartel. It can even be the case that the supplier wants to eliminate intra-brand competition to increase the profits of

[172] Gilo p. 152.
[173] Gilo p. 153–154.

its own retail outlet.[174] Exclusive territories in dual distribution scenarios can have similar anticompetitive goals and Gilo argues that this fact "bears on the rationale for treating such a vertical restraint differently than a horizontal one".[175]

Lianos brings up more pro- and anti-competitive effects of dual distribution practices. The pro-competitive effects are for example that it provides the supplier with an opportunity to monitor the performance of the retailers, the result of which the supplier can take into account when deciding on using vertical restraints to increase competition on the retail market. Through dual distribution practices the supplier can also prevent free-riding, protect its reputation and increase opportunities to serve different types of customers. The same vertical effects can be reached by purely vertical practices, though, meaning that the vertical effects of dual distribution should be examined the same way as those purely vertical practices, according to Lianos. The anti-competitive effects, such as horizontal collusion, stem especially from the horizontal dimension of dual distribution. Another effect of dual distribution is that the supplier might want to increase its market share at the retail level, at the cost of the other retailers. This harms the intra-brand competition and combined with vertical restraints on retailers selling different brands it might even harm the inter-brand competition. [176] Overall Lianos is of the opinion that while the anti-competitive effects of dual distribution "may be stronger than those of purely vertical restraints […], they are in any case less harmful for consumers than purely horizontal restraints".[177]

[174] Gilo p. 154–156.
[175] Gilo p. 156.
[176] Lianos p. 172–174.
[177] Lianos p. 174.

4.3 Dual distribution in Commission decisions

Dual distribution scenarios are not common in Commission decisions. However, the 2019 *Guess* decision had a dual distribution aspect to it, even though it did not concern information exchange. Guess Europe had used its selective distribution system to impose restrictive provisions on its third-party retailers, most notably online search advertisement restrictions, online sales restrictions, restrictions on cross selling among members of the selective distribution system, restrictions on cross border sales to end customers and resale price maintenance.[178]

Guess Europe was active as a manufacturer and distributor of Guess branded products in Europe and because of this was contracting party in the distribution agreements with the independent retailers. However, following a global strategy implemented since at least 2008, Guess Europe had become more vertically integrated and had started to sell its own products, both in its brick-and-mortar shops and online.[179] Globally, Guess wanted to grow online by directing traffic to its own site and to obtain that objective Guess Europe tried to control the competitive pressure from independent distributors selling Guess products online.[180] In other words, it tried to restrict the intra-brand competition on the retail level. The Commission did not discuss Article 2(4) of the VBER in its decision, nor the dual distribution aspect in general. Instead, it simply stated that since the agreements in question were vertical, they should be considered less harmful to competition than horizontal agreements.[181] A lost opportunity to bring some clarity to an article in great need of clarification.

[178] Guess para. 23 and 34.
[179] Guess para. 9, 20–22 and 37.
[180] Guess para. 35–36.
[181] Guess para. 193.

4.3.1 Amazon marketplace – similarities with dual distribution

In November of 2020 the Commission communicated that it had informed Amazon of its preliminary view that Amazon's conduct on its marketplace in regard to the independent sellers on the marketplace breached EU Competition law. The Commission also communicated that it had opened a second antitrust investigation into the possible preferential treatment of Amazon's own retail offers and those of marketplace sellers that use the Amazon's logistics and delivery services.[182] Amazon's dual role as both a platform provider and a retailer on the same platform makes it possible for the company to attain non-public, sensitive information on things like "[…] the number of ordered and shipped units of products, the sellers' revenues on the marketplace, the number of visits to sellers' offers, data relating to shipping, to sellers' past performance, and other consumer claims on products, including the activated guarantees."[183] Because of this the Commission started an investigation into Amazon's conduct to decide if it infringes on Article 102 TFEU.[184]

Amazon takes advantage of the fact that its competitors also are its customers and while this practice differs from the traditional dual distribution arrangement, Bloodstein argues that dual distribution can be a helpful lens to view Amazon's practices through.[185] Amazon is a dominant actor and can exercise power over both big and small users of its services in a way that would not be possible without its dominant position. Amazon can choose to launch products, knowing that there is a high demand for those products, as it has data from its users. It can then sell those products for a lower price than the users ever could and draw attention on the platform to its own products instead of the users'. Thereby Amazon stifles competition and innovation on the platform to its own benefit, all while the users feel pressure to remain on

[182] Press release of 10 November 2020.
[183] Press release of 10 November 2020.
[184] Press release of 10 November 2020.
[185] Bloodstein p. 213.

the platform because of Amazon's market power and the number of potential customers on the platform.[186]

This case is interesting because of its similarities with dual distribution scenarios. Even though Amazon is not present on, for example, both the manufacturer and retailer level it is still present at two different levels of trade. This results in Amazon having dual relationships with users of its platform: both the vertical *provider of service-customer* relationship and the horizontal *competitor-competitor* relationship. Information also plays a central role in this case, albeit not a reciprocal exchange of that information. Instead, Amazon uses its dual role to unilaterally extract sensitive business information from the users. In the vertical guidelines, when explaining the assessment of the risk of eliminating competition under the efficiency defence, the Commission emphasised that Article 101(3) and Article 102 TFEU must be read together. This case is another example of how the line between horizontal and vertical relations not always is as obvious as it might seem.

4.4 Hugo Boss – Information exchange in dual distribution scenarios

On June 24, 2020, the Danish National Competition Authority[187] (the NCA) published two decisions regarding information exchange in a dual distribution scenario. The decisions concerned conduct by Hugo Boss Nordic ApS (Hugo Boss) and Ginsborg and Hugo Boss and Kaufmann, respectively. Hugo Boss was active on the clothing market both as a supplier, supplying Ginsborg and Kaufmann with HUGO BOSS branded clothing, and as a retailer. Information was sent from the wholesale section of Hugo Boss to Ginsborg and Kaufmann, respectively. The NCA considered the information exchange activities to be on the retailer market anyways. On this market the parties were

[186] Bloodstein p. 214.
[187] Konkurrence- og Forbrugerstyrelsen.

actual competitors and therefore the NCA concluded that the relationship was horizontal.[188] The information was strategic, individualized and concerned future relations, including prices, rebates and quantities related to future clearance sales.[189]

The exchange led to, among other things, lower rebates resulting on higher retail prices for the consumers and a more coordinated, uniform and in some instances a smaller assortment on clearance sale at Hugo Boss, Ginsborg and Kaufmann.[190] The NCA came to the conclusion that the conduct was not covered by any block exemption and that the companies had not proved any efficiencies, and therefore the conduct violated Article 101 TFEU and the Danish Competition law.[191] The reasoning of the NCA in relation to whether the information exchange is part of the vertical or horizontal relationship and why the VBER was not applied in the decisions are examined below.

4.4.1.1 A vertical or horizontal relationship

The Danish Competition Authority considered the information exchange to be part of horizontal concerted practices in both decisions. It had three main reasons for this view. Firstly, the NCA referred to the *Tate & Lyle* case, in which the CJEU stated that even though a party can claim that a concerted practice is of vertical nature it cannot avoid taking the information into account. Secondly, the NCA referred to its own statements in earlier decisions in which it had stated that there is a risk for restriction of competition when vertically integrated companies engage in vertical information exchange. This was because of the risk for information being exchanged horizontally as well.

[188] Hugo Boss and Ginsborg, Summary para. 11; Hugo Boss and Kaufmann, Summary para. 10.
[189] In Danish: *udsalg*. See Hugo Boss and Ginsborg, Summary para. 6; Hugo Boss and Kaufmann, Summary para. 5.
[190] Hugo Boss and Ginsborg, Summary para. 8; Hugo Boss and Kaufmann, Summary para. 7.
[191] In Danish: *Konkurrenceloven* § 6. Also, see Hugo Boss and Ginsborg, Summary para. 1 and 15; Hugo Boss and Kaufmann, Summary para. 1 and 14.

Lastly, in a case concerning an agreement on partitioning of consumers the Danish Maritime and Trade Court[192] had stated that since the parties were actual competitors at the time of the conclusion of the agreement, it was to be considered a horizontal agreement. It was not to be considered a vertical agreement, part of a distribution agreement, or an expression of an agency relationship.[193] The NCA concluded that since Hugo Boss was vertically integrated and active on both the manufacturer/supplier and the retailer markets and Ginsborg and Kaufmann were active on the retailer market, all three companies selling HUGO BOSS branded products, they were active on the same relevant product and geographical market. They were therefore actual competitors and the concerted practices of horizontal nature.[194]

In both cases Hugo Boss argued that since there was no communication between the retail section and the wholesale section of Hugo Boss and because the information exchange was between the wholesale section of Hugo Boss and Ginsborg and Kaufmann respectively, the practices should be considered part of their vertical relationship.[195] The NCA acknowledged that it was possible that information connected to the vertical relationship also was exchanged between the parties. However, it also stated that vertical information exchange was not brought into question in this case and the information that was under scrutiny did not concern the parties' relationship as supplier and retailer. The NCA also stated that even though the wholesale section and the retail section of Hugo Boss allegedly were completely independent and exchanged no information between each other, wholesale still had detailed information on retail that it shared with Ginsburg and Kaufmann. In addition to this, wholesale and retail of Hugo Boss were part

[192] In Danish: *Sø- og Handelsretten*.
[193] Hugo Boss and Ginsborg, Assessment para. 410–414; Hugo Boss and Kaufmann, Assessment para. 380–384.
[194] Hugo Boss and Ginsborg, Assessment para. 416–420; Hugo Boss and Kaufmann, Assessment para. 386–390.
[195] Hugo Boss claimed that there were "vandtætte skotter" (waterproof shots) between the two sections of the company.

of the same economic entity. The objections were because of this deemed to be without merit.[196]

4.4.1.2 The applicability of the VBER

The Danish Competition Authority points out that the VBER only applies to vertical agreements and that the vertical guidelines says that the horizontal effects of vertical agreements should be treated the same as other horizontal agreements. The concerted practices in these cases did not concern vertical aspects such as distribution of the products, but future prices, rebates and quantities regarding the retail market where the companies were actual competitors. In addition to this, the NCA considered the information exchange in the two cases to be examples of by object restrictions that, as a general rule, cannot be exempted from the prohibition in Article 101 TFEU.[197]

[196] Hugo Boss and Ginsborg, Assessment para. 421–432; Hugo Boss and Kaufmann, Assessment para. 392–403.
[197] Hugo Boss and Ginsborg, Assessment para. 537–543; Hugo Boss and Kaufmann, Assessment para. 517–525.

5 Information exchange in dual distribution and legal certainty

This chapter consists of an explanation of the concept of legal certainty in Section 5.1, continues with a discussion on the issues with how information exchange in dual distribution scenarios is treated in EU Competition law in Section 5.2 and ends with a discussion on how this type of information exchange should be treated in the future in Section 5.3

5.1 Definition of legal certainty

Legal certainty[198] is not a concept used only by the Commission. The principle of legal certainty has been discussed for many years, and by several legal scholars.[199] The Commission does not provide a definition of the term, but scholars have done so several times. The most common notion is that legal certainty is connected to the predictability of legal decisions. Peczenik provides two definitions of legal certainty: formal and material legal certainty. Formal legal certainty is connected to the predictability of legal decisions, while material legal certainty is "the optimal compromise between predictability of legal decisions and their acceptability in view of other moral considerations".[200] Peczenik explains the need to distinguish the formal and material aspect of legal certainty from each other with the, so called, *Hitler argument*. If predictability is to be considered the only aspect of legal certainty, Peczenik says, the discrimination and persecutions that took place in Nazi Germany respected the principle of legal certainty. This is not in accordance with the expectations of people in modern society, who expect

[198] *Rättssäkerhet* in Swedish and *Rechtssicherheit* in German.
[199] See for example Peczenik (1989), Aarnio and Raitio (2010).
[200] Peczenik (1989) p. 31.

both high predictability and high acceptability form the moral point of view. Therefore, reasons Peczenik, there must be a second aspect of legal certainty.[201]

Aarnio has a similar view on the meaning of legal certainty and considers it to consist of two aspects. Firstly, the formal aspect of legal certainty is connected to the requirement of avoiding arbitrariness, which in turn is intertwined with the concept of predictability. Predictability means, according to Aarnio, the same as rational legal reasoning. Secondly, the final result of the legal decision must also be substantially right. This requirement means that interpretation must be justified with reference to the formal law and fulfil set standards of valuation based in equity and justice.[202]

Raitio bases his definition of legal certainty on Aarnio's and Peczenik's definitions, draws inspiration from Wróblewski's concepts of validity and presents three elements of legal certainty: formal legal certainty (predictability), substantive legal certainty (acceptability) and factual legal certainty. The factual legal certainty intertwines with formal and substantive legal certainty and reflects applied law and reasonable expectations based on administrative practice.[203] According to Raitio formal legal certainty is connected to rules and linguistic arguments, while substantial legal certainty is connected to values, political morality and transcategorical arguments. Factual legal certainty is connected to concepts, systemic arguments, proto-norms (such as principles and policies) and teleological arguments.[204]

One of Raitio's arguments for the necessity of a third aspect of legal certainty is that this corresponds with the three types of validity of law that both Wróblewski and Aarnio discuss in their work. Wróblewski names these three types systemic, factual, and axiological validity, while Aarnio uses the terms

[201] Peczenik (1989) p. 31–32.
[202] Aarnio p. 190–192.
[203] Raitio (2010) p. 372–374.
[204] Raitio (2013) p. 100–104.

formal validity, efficacy, and acceptability of legal norms.[205] Aarnio considers these to be varieties of validity. A norm is systemically valid "if and only if it is a member of a certain normative system".[206] Factual validity of a norm is instead related to actual efficacy; a norm is valid if it is accepted and applied by legal officials. Axiological validity is related to extra-legal criteria or values, such as justice, and "gives the system of norms its ultimate legal validity".[207]

My understanding of Raitio is that he considers legal certainty to be a scale, from formal, to factual and substantive legal certainty. Aarnio instead sees it as a concept with two aspects, formal and substantial, while Peczenik calls the two aspects formal and material legal certainty. I am not convinced by Raitio's arguments regarding the necessity of considering legal certainty as a scale and I do not think that the factual legal certainty actually clarifies the concept of legal certainty. Aarnio's and Peczenik's concepts of legal certainty are very much alike, but when applying them in an analysis of a practical problem Peczenik's is preferable. Because of this, Peczenik's concept of legal certainty is the perspective that is primarily used in this thesis.

As mentioned above, formal legal certainty is the same as predictability. The predictability is high when the exercise of public power to a high degree follows the law. This, in turn, characterises the concept of the legal state, the *Rechtsstaat*[208] and the *Rättsstat* in German and Swedish respectively. In this way formal legal certainty and the legal state are closely intertwined.[209] According to Peczenik there are some factors that promotes material legal certainty, such as: exact and general laws; equality before the law; slow pace of change of the laws; public decisions being made under the laws; transparency of the content of the laws and the caselaw; independence of the courts; those in power being held accountable in an effective way; low

[205] Aarnio p. 167.
[206] Aarnio p. 169.
[207] Aarnio p. 169–172.
[208] See for example how this term is used in von der Pfordten.
[209] See Peczenik (1995) p. 51; Peczenik (1989) p. 33; Raitio (2010) p. 80.

dependence of the law on other social norms and institutions, such as religion; and good legal reasoning supporting the interpretation and application of law.[210] Material legal certainty is based on both predictability as described above and acceptability in view of other moral considerations. Peczenik uses the term *moral* in a wide sense. Economical, redistributive, environmental, and other legal policies are moral considerations because they ultimately tell what is *good* for people. Even justice is such a moral consideration.[211]

5.2 Current legal certainty issues

5.2.1 Issues related to the dichotomy in competition

Agreements and concerted practices where competitors knowingly substitute the risks of competition for practical cooperation and reduce their decision-making independence are not allowed under EU law. Horizontal and vertical agreements have different effects on competition, and so do horizontal and vertical information exchange.

The restrictive effects of horizontal information exchange are often that they allow the parties of the agreement to increase prices, change output, lower the quality, decrease product variety and stifle innovation in a normally non-profitable way and still be profitable. Vertical information exchange can result in distributors being limited to certain geographical markets, distributors being influenced to sell products for a certain price, parallel imports being stopped, and the vertical information being passed on to competitors. It can also cause foreclosure of the market.

However, information exchange can have pro-competitive effects, especially horizontally. Cost-related information can make companies more effective by

[210] Peczenik (1995) p. 51–52.
[211] Peczenik (1995) p. 92–95. The word Peczenik uses in Swedish is *etisk*, which more closely translates to *ethical*. However, considering that he uses the word *moral* in his works written in English, this is the term I use in this paper.

providing a benchmark and demand information can allow companies to reduce unnecessary inventory. R&D agreements have not been discussed at length in this thesis, but these kinds of agreements can promote technical progress. Vertical restraints in general can have pro-competitive effects. They can help against free-riding problems, help introducing completely new products or old products on a new market, act as security when know-how is part of distribution agreements, and help against other inefficiencies like the double marginalisation problem.

In the cases with purely vertical information exchange that are brought up in Section 3.3 the information concerned recommended resale prices and market prices, as well as information regarding alleged sanctions that would be implemented if these prices were not applied. This information was sent from the manufacturer to the retailers in order to pressure them into increasing resale prices. In this case the RPM was not allowed, as the pressure put on the retailers to use the "recommended price" indicate that it really was a minimum resale price, something that is considered a hardcore restriction.

The horizontal information exchanges presented in Section 2.3 were made in order to stabilize market shares and stop decline of prices. The information concerned prices, stock levels, customers, production processes, capacity and sales results: very sensitive information.

In dual distribution scenarios the effects on competition are most likely more harmful than purely vertical effects, but less harmful than purely horizontal effects. The anti-competitive effects often come from the horizontal aspects of the relationship, as the information exchange can lead to horizontal collusion or allow the supplier to expand at the cost of the retailers' market shares. The pro-competitive effects of information exchange can be the prevention of free-riding and allowing the supplier to monitor the retailers in order to find out if vertical restraints are necessary. In the Hugo Boss cases the information that was exchanged between the parties concerned future relations, prices, rebated, and quantities related to future clearance sales. This

was done to coordinate rebates and thereby increasing the prices and decreasing the assortment on clearance sales. The information came from Hugo Boss at the request from Ginsborg and Kaufmann, and the NCA decided that the information was related to the horizontal relationship, not the vertical one.

5.2.2 Issues related to Article 2(4)

The issues with Article 2(4) are both related to dual distribution in general, and to information exchange in such scenarios in particular. When dealing with information exchange in a dual distribution scenario the vertical and horizontal aspects of the agreement are to be evaluated separately. The horizontal aspect is assessed as horizontal agreements generally are assessed under Article 101 TFEU and the vertical aspect can either be assessed under the VBER or Article 101 TFEU depending on what necessary conditions are met.

In Section 4.1 the meaning of the phrase "non-reciprocal agreement", a requirement necessary for an agreement to fall under Article 2(4) VBER, was examined. To find the meaning of the phrase in the CJEU caselaw concerning concerted practices is not possible as the term "reciprocal" is used to establish the line between what is, and what is not, a concerted practice. Using this definition makes the phrase "non-reciprocal agreement" contradictive. If there is not even a concerted practice, then how could there be an agreement.

The meaning can instead be the same as in the old guidelines. The phrase then means that agreements where two manufacturers become each other's distributors do not fall under the article. That would mean that the article repeats itself in a rather clumsy way, since Article 2(4)(a) says that the supplier must be a manufacturer and a distributor of goods, while the buyer must be a distributor, and not a competitor at the manufacturing level.

The Commission removing the description of non-reciprocal agreements in the new guidelines speaks against this being the meaning today. Either it was removed due to the repetition, but with the intention to keep the meaning the same or it was removed because the meaning of the phrase changed.[212] If the first alternative was correct the phrase should have been removed from the VBER as well. However, it was not. If the second alternative is correct, why did not the Commission include the new definition in the new guidelines? It is all very unclear.

This leaves us with the alternative that today the non-reciprocity refers to the restraints and obligations in the agreement, as it does in the technology transfer guidelines. This meaning makes the most sense out of the different alternatives discussed but if this is the meaning, why is the explanation not included in the guidelines?

It is a serious legal certainty issue that it is this difficult to understand the meaning of the necessary conditions in the article. It lowers the predictability of the legal decisions concerning dual distribution scenarios in general, but especially regarding information exchange. Exact laws are essential for predictability and predictability in turn is one of the most important parts of legal certainty. The guidelines could be a way to increase the predictability, as it shines light on how the Commission's assessments are made. For this to be the case, however, the Commission must also follow the guidelines most of the time.

The lack of explanation of the meaning of non-reciprocal agreements is not the only shortcoming of the guidelines. They also leave out how information exchange should be assessed in vertical or dual distribution scenarios. Information exchange is central to horizontal cooperation and takes up a large

[212] I have not been able to find the impact assessment that was made for the 2010 VBER and guidelines on the EUR-Lex database or on the Commission's homepage. It is possible that there is an explanation as to why the definition was removed from the vertical guidelines in that document. However, the fact that the impact assessment is this hard to find supports my point in the discussion as it shows a lack of transparency of the content of the law, and transparency is also part of material legal certainty.

part of the horizontal guidelines. The lack of discussion on purely vertical information exchange in legal literature indicate that it is not a similarly important issue in vertical relationships. Instead, legal scholars are more interested in vertical agreements used to achieve horizontal collusion, for example hub and spoke arrangements. This is an explanation of the lack of guidance in relation to vertical information exchange from the Commission.

Dual distribution scenarios include both vertical and horizontal aspects. This means that in a dual distribution scenario information exchange can be both a central part of the agreement, and a completely uninteresting part of the agreement at the same time. Depending on if the information exchange is characterised as horizontal or vertical there is plenty of guidance or almost no guidance at all. The vertical and horizontal aspects of the agreement are to be assessed in different ways and result in fines of different sizes. However, no guidance is given on what vertical information exchange look like and this makes it more difficult to separate the vertical and horizontal aspects of information exchange. This in turn decreases the predictability. Because of this there is a need both for guidance on what vertical information exchange look like and on how to determine what aspects of information exchange in dual distribution scenarios are vertical and horizontal. This could increase the predictability.

According to the guidelines, the horizontal and vertical aspects of the agreements in dual distribution scenarios are first assessed separately and then part of an overall assessment in the end. This can be an issue since information exchange that is allowed in vertical agreements can be forbidden in a horizontal relationship. In a selective distribution agreement, there are often criteria linked to the nature of the product that the retailer must live up to in order to get the dealership. One such quantitative criteria can be minimum or maximum sales or maybe requiring a certain stock capacity. In order to make sure that these criteria are met there will be a need for monitoring of some kind. In a dual distribution situation where the retailer and supplier are also competitors this information is very similar to information that is not allowed

to be exchanged between competitors in purely horizontal relationships. How should a vertically integrated company handle this when assessing its distribution agreements? This problem is not addressed in the VBER, nor in any of the guidelines, making it difficult to predict the outcome of a legal decision concerning it and thereby hurting the legal certainty.

Guidelines can increase the predictability of legal decisions, but they can lower the legal certainty in other ways. They blur the line between what is a law and what is not, and create expectations that might not be met. Raitio thinks this hurts, what he calls, the third aspect of legal certainty, or the factual legal certainty. He connects that aspect of legal certainty to expectations based on former conduct by authorities. However, I think that when expectations based on guidelines are not met it instead hurts the predictability, as companies trying to make their own assessments rely on the Commission following the guidelines in most cases. If the Commission does not follow the guidelines, it becomes more difficult for companies to predict the outcome of legal decisions. The guidelines are a product of the lack of precision in the laws and a lack of caselaw interpreting them. That guidance is ultimately not binding for the courts or the Commission, hurting the predictability.

5.3 Increasing legal certainty in the future

At the moment, before the new block exemption and the related guidelines are presented, the information exchange is considered vertical or horizontal in nature depending on the characteristics of the relationship and restraints. It is possible to argue that this is the best way to assess dual distribution information exchange. It is very uncommon that this type of scenario catches the Commission's eyes and since the vertical and horizontal aspects are different one can argue that it should not be that hard to separate them.

If this is the way the Commission intends to go, though, there is a need for two things. First, the Commission must make it clear what a non-reciprocal

agreement is. Second, the Commission should present better guidance on what characteristics should be taken into account when deciding if the information exchange in a dual distribution scenario is part of the vertical or the horizontal aspect of the agreement. This type of guidance might not be suitable to put in a regulation, and the guidelines would therefore be a good way to present this information.

Another solution is to simply decide that information exchange in dual distribution scenarios always should be considered vertical or always be considered horizontal. That would indeed increase the predictability of the legal decisions. It would also result in a lack of nuance. For example, if all dual distribution information exchanges were to be treated as horizontal information exchange, cases that have more in common with vertical agreements would be punished more severely. This would be the case even though they have an effect on competition that is more similar to the effect of vertical restraints.

Similarly, if all dual distribution information exchange was to be treated like vertical restraints, the restraints would receive less harsh punishment, even though the effect they have on competition is more similar to the effects of a cartel. The vertical and horizontal aspects of restraints in dual distribution scenarios being punished more or less severely than similar restraints in purely vertical or horizontal agreements would mean that similar cases would not be treated similarly. EU Competition law would then not honour the principle of equality, another important part of material legal certainty.

Information exchange can be part of practices similar to dual distribution scenarios as well. The Amazon case described in Section 4.3.1 shows that the distinction of horizontal and vertical agreements not always is obvious. The objections that the Commission had regarding Amazon's conduct mainly concerned how Amazon uses information on its competitors' sales results, revenue, performance etc. to find out what products to start selling. In other words, Amazon uses its vertical integration to gain an edge on its competitors.

In the *Guess* case the Commission considered the relationship between Guess and the independent retailers to be vertical in nature. Guess wanted to grow its own online shop at the cost of its retailers, and similar dual distribution scenarios will most likely not be less common in the future. It is also possible that there will be more cases where the line between horizontal and vertical is blurred in other ways, as with Amazon. It is also possible that there will be cases where the supplier demands information on store capacity or sales results to accept the retailer. To increase the predictability surrounding these line-blurring activities the Commission could develop the guidelines to take into account that not all agreements are either horizontal or vertical.

A third way to increase legal certainty is therefore that the Commission presents new guidelines for cases with both vertical and horizontal aspects. This could benefit legal certainty not only in dual distribution scenarios, but in other scenarios where the parties are active on both the same and different levels of trade. Despite my critique of the usage of guidelines and their negative effects on legal certainty, they can also have positive effects on legal certainty. This is especially true considering the complete lack of caselaw. Guidelines with the proper formulation could allow for the special economic aspects that are present in dual distribution scenarios to be taken into account. It is impossible to say that the outcomes of the legal decisions concerning information exchange in dual distribution scenarios would be different than the ones today. However, the level of legal certainty surrounding those decisions definitely would be.

6 Conclusion

The legal certainty issues regarding information exchange in dual distribution scenarios arise primarily from a lack of predictability. This unpredictability is caused by Article 2(4) as it contains necessary conditions with unclear meaning and by the guidelines as they offer no explanations as well. Another issue that decreases the predictability is that EU Competition law is stuck in a way of reasoning centring around the vertical-horizontal dichotomy without fully recognizing the cases that are not as easily divided into one of the two.

The legal certainty issues can be resolved in a number of ways. It can be done by adding a definition of the phrase “non-reciprocal agreement” in the new VBER, or by removing the phrase completely if it lacks importance. The Commission could also add guidelines on how to separate the vertical and the horizontal aspects of information exchange in dual distribution scenarios, or it could add a completely new section in the vertical guidelines that explains how to make an overall assessment of several different kinds of conduct that blur the line between vertical and horizontal relationships in EU Competition law.

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