Exclusive distribution: An overview of EU and national case law

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An impartial commentator cannot but be surprised that, 45 years after the Consten and Grunding [1] ruling in the E.U., 34 years after the Sylvania ruling in the U.S [2], and one year after the last reform undertaken by the European Commission (the “Commission”) in this area [3], exclusive agreements (“exclusive agreements”) remain at the spotlight. This is due to the existence of an inherent and, therefore, unsolved tension between the commercial needs of companies, the E.U. political imperatives regarding the Internal Market and modern antitrust theories. As a result, the European (including both at the E.U. and at the national level) case-law regarding exclusive agreement is somewhat heterogeneous and not always consistent. The increasing importance of Internet distribution (see Section II.3 below) further adds to the complexity of the analysis of these types of agreements.

The heterogeneity of solutions regarding exclusive agreement becomes even bigger when one takes into consideration, as the present issue of e-Competitions does, the practice of the National Competition Authorities (“NCAs”) [4] and Courts [5] or the development of new methods of distribution such as the Internet [4]. Perhaps this is not as worrying as it might seem at first sight. On the one hand, there are effective safeguards ensuring the uniform application of European law [6]. On the other hand, the antitrust markets in which vertical restraints are usually imposed (e.g., motor vehicles, etc.) are usually national and the different Member States have different legal traditions and jurisprudence and it is normal that they take them into account when assessing exclusive agreement, providing this does not hinder the uniform application of European law.

The key question regarding exclusive agreement is, of course, whether they are pro-competitive or anti-competitive. The answer, like in so many other areas of the law, is: “it depends”. Broadly speaking, E.U. law and the Antitrust laws of the Member States deal with exclusive agreement in a relatively lenient way [7] providing the company applying them is not particularly large [7] and / or in the antitrust authorities’ view avaricious in the terms it imposes to its commercial counterparts [10a Dutch Court of First Instance interpreted the Dutch equivalent (…) or when combining exclusive agreement with other vertical restraints [11].

I. The Economics of exclusive agreement

From an economics standpoint, the pros and cons of exclusive agreements are well known.

The primary concern is market foreclosure in case the supplier has a significant degree of market power [12] (in particular when combined with a network of exclusivity agreements concluded by other suppliers) [13]. However, the establishment of exclusive agreements is sometimes encouraged by Competition authorities as a means of increasing investments and enhancing brand image [14a]. Also, the loss of intra-brand competition might be outweighed by strong inter-brand competition, which is ultimately more beneficial to consumers [15a].

Although not limited to the following, the main pro-competitive justifications for exclusive arrangements include:

- To encourage dealers to promote a manufacturer’s products more vigorously and to prevent inter-brand free-riding [15]. In the case of a buyer’s agreement not to purchase competing products, the exclusive arrangement...
may be necessary to prevent the buyer from free-riding on investments made by the seller. In case of a supplier’s agreement not to supply the buyer’s competitors, the arrangement may be necessary to prevent other dealers from free-riding on investments made by the buyer, e.g., service or promotion.

To encourage manufacturers to help dealers by providing services or information benefiting consumers. The application of exclusive distribution helps create and maintain a brand image by imposing a certain measure of uniformity and quality standardization on distributors, thereby increasing the attractiveness of the product to the final consumer and increasing its sales potential.

To ensure a steady, reliable outlet of supply for a manufacturer so that it can make investments that increase efficiency or permit scale economies. For instance, the use of exclusive distribution by smaller market players in addition to brand-enhancing strategies can help them achieve the economies of scale necessary to compete effectively in the market, to the benefit of the end-consumers.

To allocate capital more efficiently by overcoming information asymmetry. The usual providers of capital (e.g., banks or equity markets) may provide capital sub-optimally when they have imperfect information on the quality of the borrower or where there is an inadequate basis to secure the loan. On the other hand, the supplier may have better information and be able, through an exclusive relationship, to obtain extra security for its investment.

II. The legal framework

1. A Little Bit of History: The Grundig Ruling, the Commission’s Modernization Efforts and the new Block Exemption Regulations

E.U. Competition law has been criticized for decades for its alleged failure to take a sufficiently realistic view of whether an agreement restricted competition for the purposes of Article 101(1) TFEU. In addition, for many years both the Court of Justice of the European Union (the “CJEU”) and the Commission appeared unwilling to recognize the efficiencies resulting from exclusive agreement. Broadly speaking, the CJEU backed the Commission in following an (arguably) over-formalistic approach deriving from (i) the CJEU’s concern, enshrined in the Consten and Grunding ruling, that exclusive agreement might be used to isolate national markets, erect barriers to trade, and maintain price differences between Member States; and (ii) the Commission’s early ordinalbread philosophy which considered as potentially anticompetitive any agreement which restrained the parties’ economic freedom. Consequently, from its earliest days, the Commission took a broad view of what constituted a restriction of competition and considered that almost any exclusive agreement fell within the scope of the prohibition of Article 101 TFEU. In addition, it adopted a strict and formalistic approach when applying the Article 101 TFEU criteria to exclusive agreement, particularly when they involved “absolute territorial protection.” As a consequence, businesses felt the need to secure exemptions for their distribution agreements.

The criticisms that the Commission’s approach to exclusive agreement received, eventually led the Commission to introduce changes. Regulations 2790/1999 and 330/2010 were adopted, thereby bringing several significant changes to the way in which vertical restraints were dealt with under Article 101 TFEU (which we will set out in more detail in Section b) below). The Commission has also recently issued a number of decisions adopting a more economically realistic approach. And so have some NCAs including the so-called “new Member States.”

2. The applicable rules to exclusive agreement: Regulation 330/2010 and the Guidelines on Vertical Restraints

Regulation 2790/1999 adopted a flexible approach exempting from the prohibition of Article 101 TFEU almost all exclusive agreement provided that (i) the supplier did not exceed a specified market share threshold (of 30 per cent) and (ii) that the exclusive agreement in question did not contain any of the so-called “hard-core” restrictions (resale price maintenance, absolute territorial protection, the so-called “air-tight” exclusive territories, etc).

Regulation 330/2010 kept the same market share threshold of 30% but it established that the threshold should be met by both distributors and retailers, to account for the fact that some buyers may also have market power with potentially negative effects on competition.

Where an exclusive agreement is not exempted by Regulation 330/2010, the parties to the agreement will have to make their own assessment as to whether or not Article 101 TFEU is applicable. NCAs seem also willing to consider individual exemptions, providing the requirements of the Guidelines on Vertical Restraints are met. It should be recalled that Member States and their NCAs were actively involved in the drafting of Regulation 330/2010, replying to questionnaires about their experience with the existing rules and participating in several official consultations.

Both European Competition law and the Competition laws of the different Member States treat exclusivities outside the block exemption differently, depending on which of the contractual parties (i.e., supplier or distributor) bears the exclusivity and on the nature of the exclusivity. The Guidelines on Vertical Restraints accordingly provide a different treatment for those scenarios where (i) the exclusivity falls on the buyer, who is “obliged or

Exclusive distribution: An overview of EU and national case law
Andrés Font Galanza, Eryk Lucas Dziadziewicz, Pablo Freireira | 2 January 2012 | e-Competitions | N°41235 | www.concurrences.com
induced to concentrate its orders for a particular type of product with one supplier" (the so-called “single branding” agreements) [31]; (ii) the exclusivity falls on the supplier who “agrees to sell his products only to one distributor for resale in a particular territory” (the so-called “exclusive distribution”) [32] or “to a particular group of customers” (the so-called “exclusive customer allocation” agreements) [33]; (iii) the exclusivity falls on the supplier, who “is obliged or induced to sell the contract goods only or mainly to one buyer, in general for a particular use” (the so-called “exclusive or industrial supply” agreements) [34]. The analysis would be the following:

i. The European Commission is concerned by Single Branding Agreements, inter alia, insofar as they might lead to the foreclosure of the market of competing suppliers and potential suppliers [35]. The French Competition Authority has recently applied the principles enshrined in the E.U. Guidelines on Vertical Restraints in the Accentiv’ Kadeos, the Orange Caraibe / France Telecom and the FFF-Sportfive cases [36]. The Bulgarian Supreme Administrative Court has applied the more effects-based approach that the Commission has enshrined in its Article 102 TFEU Enforcement Priorities [37] in its Iosini ruling [38].

ii. As regards exclusive distribution, European Competition law tends to have a strict view on prohibitions of the so-called “passive sales”, i.e., prohibitions of sales deriving from unsolicited requests from individual customers [39]. NCAs have also applied these principles [40]. However, the “new” (2010) Guidelines on Vertical Restraints now provide for a specific set of circumstances where absolute territorial protection is allowed and the prohibition of the so-called “passive sales” are allowed for a period of up to two years when the prohibition is necessary to sell a new brand or sell an existing brand on a new market [41]. Even before the adoption of the new Guidelines, some NCAs had already adopted a more lenient view to restrictions hitherto considered hardcore [42].

iii. For the European Commission, “the main competition risk of exclusive supply is [the] anticompetitive foreclosure of other buyers” [43]. This seems to be also the approach followed by the NCAs [44].

3. Exclusivities and the Internet

Most suppliers embrace the Internet as a powerful tool to target a broader range of consumers than can be reached through traditional advertising, and to obtain feedback allowing for a more accurate tailoring of their offerings in order to better meet demand. At the same time, there are many practical obstacles to a vibrant E.U. online trade market including both consumer and commercial issues as well as regulatory ones [45]. The E.U. policymakers are focused on overcoming these barriers through various regulatory measures [46].

Against this background, the revised Vertical Restraints regime broadly upholds the previous provisions regarding “passive sales” on the Internet [47]. For instance, according to the new Guidelines on Vertical Restraints [48], the use of the Internet is not considered a form of active sales into different territories or customer groups, since it is considered a reasonable way to reach every customer [49]. This leads to difficulties in practice since for example, a Spanish website translated into Polish is most likely targeted at Polish consumers living in Poland rather than Polish citizens living in Spain. However, the Guidelines on Vertical Restraints seem to imply that even these circumstances would qualify as a passive selling. It remains unclear in what circumstances a website could ever be considered to address specific customers and therefore constitute active selling.

In short, the Commission kept in its new Guidelines on Vertical Restraints the original provisions on passive sales with regard to online commerce. This might have been in part mandated by an overarching political imperative to support Internet commerce as the “magical” formula for E.U. market integration.

III. Are/should exclusivities be treated differently under Article 101 TFEU and under Article 102 TFEU?

Dominant companies may also enter into exclusive agreement. The evolution of the European rules on the abuse of dominant position is outside the scope of these pages but, broadly speaking, it could be argued that E.U. law has moved from a more formalistic approach to a more economics-oriented effect-based approach [50].

The problem, therefore, arises, as to the extent to which exclusive agreements should be analysed using a similar framework both under the rules prohibiting anticompetitive agreements and under the rules prohibiting abusive unilateral conduct or whether different rules should apply. If the Commission’s latest (and more effects-based) thinking, as depicted in its Guidance on Enforcement Priorities, prevails, there should not be any reason why the applicable rules should vary depending on whether Article 101 or Article 102 TFEU are applied [51]; the focus should be on the foreclosure effects of the conduct and the result would be the same depending on whether Article 101 or Article 102 is applied. If the company enjoying market power and engaging in an anti-competitive exclusive agreement shares its profits with its counterparty to the exclusive agreement, the recent practice shows that in some cases the relevant
competition authorities have invoked the two provi-
sions [5], (and, therefore, both parties to the exclusive
agreement could theoretically be fined).

Some authors argue, however, that companies having a
dominant position should be held to a higher standard [5],
an argument which is probably coherent with the fact
that, under E.U. Competition law, companies enjoying a
dominant position have a “special responsibility” not to
allow its conduct to impair competition in the market. For
instance it also seems reasonable to anticipate that a
network of exclusivity agreements signed by a company
in a situation of super-dominance where network effects
are virtually impossible to reverse will not be assessed in
the same way by the antitrust authorities than other more
easily reversible situations in terms of market foreclosure.

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IV. Conclusions

Stakeholders have been dealing with exclusivities and
E.U. antitrust under changing legal frameworks and more
sophisticated economic theories. However, the funda-
mentals remain the same. The pro-efficient effects of
exclusivities have been increasingly recognized by the
antitrust authorities at E.U. and National level who have
gradually added a limited number of new options in terms
of territorial restrictions notably in scenarios where a new
product or brand is launched.

Internet commerce is necessarily affecting some basic
premises of the E.U. antitrust assessment of exclusivities
such as the difficult accommodation of Internet com-
merce in the classic distinction between active and
passive sales. In this light Internal market political impe-
ratives and the wish to protect demand from more and
different customers seem particularly important policy
considerations.

Situations of super-dominance dramatically increase E.U.
antitrust liability within the uncertain boundaries of a pos-
sible application of Articles 101 and/or 102 TFEU in par-
cular when it can be argued that exclusivity agreements
are used in situations where entry barriers seem insur-
mountable and monopolisation through market levera-
ging into adjacent markets seems credible.

As the national cases summaries included in this number
of e-Competitions show, there is an appearance of hete-
rogeneous application of antitrust policy on exclusivities
across the E.U. Understandably this heterogeneity seems
lower in the area of remedies in case an infringement was
found. These remedies shall be relatively straightforward
from a contractual point of view. The assessment of ex-
clusivity cases is very much fact-based and ultimately call
for a rule of reason decision where proportionality aspects
are paramount that is why higher uniformity in the appli-
cation seems difficult to achieve and might not even be
desirable.

The contractual or de facto combinations of exclusivities
with other non-hard core restrictions remain possible
thereby offering some interesting commercial opportuni-
ties for the informed economic operator.

NOTES

[1] See Joined cases C-56 and C-58-64 Etablissements Consten
S.A.R.L. and Grundig-Verkaufs-GmbH v Commission of the
European Economic Community, [1966] ECR, Page 00429
("Consten and Grunding").


"Antitrust: Commission adopts revised competition rules for dis-
tribution of goods and services", IP/10/445, Brussels, 20 April
2010.

[4] Compare, e.g., the (i) Decision of the Autorité de la Concur-
rence on 11 January 2010, accepting the commitments offered
by Apple and Orange to limit to 3 months any distribution exclu-
sivities relating to current or future iPhone models in order to
terminate infringement proceedings conducted under E.U. law;
with the (ii) ruling of the Regional Court of Hamburg on 4 Decem-
ber 2007 in Case n° 315 O 923/07 iPhone, where the Court consi-
dered compatible with both German and E.U. Competition law
an agreement between the German mobile network operator T-
Mobile and Apple Inc. for the launch of the iPhone. See Lila Fer-
chiche, The French Competition Authority accepts the commit-
ments to waive distribution exclusivity on mobile telephones
(iPhone-Apple - Orange, 11 January 2009, e-Competitions, n°
301986 and Petra Linsmeier, Moritz Lichtenegger, A Germainan
Court rules on the exclusive iPhone distribution agreements

[5] NCAs and Courts have even taken up cases when the facts had
been already taken into consideration by the Commission (e.g.,
a Spanish court looked at an issue the Commission had already
dealt with by dint of an Article 9 Commitments Decision in the
ruling 477/2007 of the Juzgado de lo Mercantil on 29 July 2007,
in Case Carburantes Costa de la Luz v. Repsol). See Aitor
Montes de Oca, Angel Givaja Sanz, A Spanish Court holds that
it is not bound by an EC Commission decision under Art. 9 of EC
Reg. 2003/2003 (Carburantes Costa de la Luz v Repsol), 29 July
2007, e-Competitions nº 16060.

[6] A similar heterogeneity can be found in the domain of unfair trade
law regarding the Ryanair “screen-scraping” saga of cases.
Ryanair has faced challenges in several European countries
regarding its singularity, which lies in its selling tickets to
end users directly, without intermediaries. Compare the ruling
of the Paris Court of First Instance on 9 April 2010 in Case n°
8/12802 Ryanair / Opodo, denying the airline the possibility
of online travel agencies selling its tickets without intermediaries
with, e.g., the ruling of the Regional Court of Hamburg, on 28
May 2009, Az. 3 U 191/08, which ruled against Vours, a travel
agency which used screen-scraping techniques allegedly to
Ryanair’s displeasure. See Cédric Manara, The Paris Court of
First instance denies an airline company having an exclusive dis-
tribution model the right to prevent an online travel agency from
selling its tickets (RyanAir/Opodo), 9 April 2010, e-Competitions
n° 32665.

[7] To name but a few: (i) the principle of Supremacy of E.U. law; (ii)
the issuance by the European Commission of detailed Guidelines
on Vertical Restraints; (iii) the existence of the European Compe-
tition Network and the mechanisms of cooperation between
competition authorities provided therein, (iv) the possibility for
National Courts, to ask for a preliminary ruling from the Court of
Justice of the European Union (see Article 267 TFEU) and (v) the
provision, in Article 39 of Council Regulation No 1/2003 of 16
December 2002 on the implementation of the rules on competi-
tion laid down in Articles 81 and 82 of the Treaty, Official Journal
L 001, 4 January 2003, P. 0001 – 0025 that “[... the application of
national competition law may not lead to the prohibition of

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Andrés Font Galán, Eryk Lucas Dziadkiewicz, Pablo Pfeiferer | 2 January 2012 | e-Competitions | N°41235 | www.concurrences.com
agreements [...] which may affect trade between Member States but which do not restrict competition within the meaning of Article [101(1) TFEU] of the Treaty, or which fulfil the conditions of Article 101(3) TFEU of the Treaty [...].

[8] See, e.g., the example included by the Commission at para. 202 of its Guidelines on Vertical Restraints, which declares the exemption provided in Article 101(1) TFEU applicable to an exclusive supply agreement of a duration of 5 years entered into between a supplier with a market share of 35% and a buyer with a market share of 50% on both the upstream competitor market and the downstream final goods market of 40%.

[9] See, e.g., the Guidelines on Vertical Restraints, which provide, at para. 194 in fine, that “[w]here a company is dominant on the downstream market, any obligation to supply the products only or mainly to the dominant buyer may easily have significant anti-competitive effects”. The Guidelines on Vertical Restraints include a similar provision regarding single branding at para. 140 (“[f]or a dominant company, even a modest tied share may already lead to significant anti-competitive effects”). Finally, the Guidelines on Vertical Restraints provide, at para. 153, that “the market position of the supplier and its competitors is of major importance, as the loss of intra-brand competition can only be problematic if inter-brand competition is limited”. See further the Ruling by the Hungarian Metropolitan Court of Appeal of 17 November 2010, Case no 2º KF.27.408/2010/S, Kortex Mérköni Iroda Kft v Competition Authority (as a result, as we will see below, of the Hungarian NCA using an arguably narrow market definition). See Márton Horányi, The Hungarian Metropolitan Court of Appeal upholds an infringement decision of the NCA concerning an exclusive supply agreement of a duration of 5 years entered into between Rotim, a Dutch company importing, selling and distributing ballast materials presumably because of the long duration of the agreement (from 1983 to 2008, with an option for renewal), and declared the agreement void. According to the ruling, Rotim would have the exclusive right to sell ballast materials to the Dutch Railways Company. See Ruling of the Dutch Court of First Instance of Hertogenbosch on 30 June 2006, in case 140052 Rotim v: Ballast and Tristan Baumes, Katevéne, Lafourche, A Dutch Court of First Instance declares an exclusive distribution agreement on the market of ballast materials for the construction of railways void according to the Dutch Competition Act (Rotim/Ballast), 30 June 2006, e-Competitions n° 12437.

[10] E.g., a Dutch Court of First Instance interpreted the Dutch equivalent to Article 101 TFEU in an arguably restrictive manner when declaring that an exclusive distribution agreement entered into between Rotim, a Dutch company importing, setting and distribution ballast materials for railways and Basalt, a company estab-


[11] See the Guidelines on Vertical Restraints, at paras. 162 and 167, which deal with the combination of exclusive distribution with exclusive sourcing. See further the Ruling by the Hungarian Metropolitan Court of Appeal of 17 November 2010, Case no 2º KF.27.408/2010/S Kortex Mérköni Iroda Kft v Competition Authority, upholding an infringement decision of the Hungarian NCA regarding an agreement combining exclusive supply and single branding (as a result, as we will see below, of the Hungarian NCA using an arguably narrow market definition). Of course, if an exclusive agreement is combined with hard-core restraints, like resale price maintenance, the authority will usually hold it illegal. See, e.g., the ruling of the Austrian Supreme Court of 15 July 2009, in case K 9836/05/09 Press Distribution and Florian Neumayer, Gerhard Fussenegger, The Austrian Supreme Court confirms a decision of the Cartel Court whereby cross-boarder RPM between a German publisher and an Austrian press distributor infringes Art 81.1 EU therefore preventing the exception provided in national legislation: closing ban of RPM in the book / magazine sector - to apply (Burda / Pressegroßvertrieb), 15 July 2009, e-Competitions n° 31016.

[12] Guidelines on Vertical Restraints, at para. 151. See, e.g., Decision of the Autorité de la Concorance10-D-01 (accepting commitments to waive distribution exclusivity on mobile telephones) but see Judgment of the German Regional Court of Hamburg of 4 December 2007 (regarding the same issue on the German market). In the words of Steven Salop: “[…], efficiency benefits are not inherent in exclusives. Exclusives might instead reduce competition by destroying rival’s efficient access to key inputs, make experimentation more difficult, and raise switching costs. Stated most simply, the use of bundling to purchase market power as well as a channel of distribution, source of supply, or additional customer” (see Salop, S. “Economic Analysis of Exclusionary Vertical Conduct: Where Chicago has Overshot the Mark”, in Pf-torney, (ed.) How the Chicago School Overshot the Mark. The Effect of Conservative Economic Analysis on U.S. Antitrust, Oxford University Press, 2008, at p. 150).


[14] For instance, the Commission states that the combination of exclusive distribution and single branding may be considered pro-

competitive as it increases the incentive for the exclusive distrib-

utor to focus its sales efforts on a particular brand (see Guide-

lines on Vertical Restraints, at para. 161).

[15] Guidelines on Vertical Restraints, at paras 102, 153 and 154. See also, e.g., Decision of the Autorité de la Concorance, 09-D-22, related to NGK Spark Plugs France practices in the plug market for two-wheel vehicles (regarding intra/interbrand competition). See Ombline Ancelin, Charles Saumon, The French Competition Council holds antitrust for an exclusive purchase clause in a selective distribution agreement (NGK Spark Plugs), 21 July 2006, e-Competitions, n° 12431, Marie Koehler, The French Competition Council fines an exclusivity purchase clause contained in a selective distribution agreement on the basis of both Art. 81.1 EU and French provisions (NGK Spark Plugs), 21 July 2006, e-Competitions, n° 12430, Marie Koehler de Montblanc, Selective distribution : The Competition Council decides on the validity of national exclusive purchase agreements (NGK Spark Plugs), 21 juillet 2006, e-Competitions, n° 27397 and David Seyl, The Free competition Authority fines a spark plugs producer for exclusive dealing practices (NGK Spark Plugs), 21 July 2006, e-Competitions, n° 12431. Regarding the duration of the permitted exclusive agreement and market power of the supplier, see, e.g., UK Office of Communications (Ofcom), 18 January 2006, Own-investigation initiative into the price of making telephone calls to hospital patients, Patientline Limited et al vtrust law, CW/00844/06/05 (agreements of 10 to 30 years in a two sided market declared legal) compared with Decision of the Autorité de la Concorance, 10-D-07, Titres Cadexa / Kadéos (exclusive agreement by a dominant supplier of multi-

store gift cards up to 5 years considered excessive). See Justin Coombs, The UK telecommunications regulator closes an investig-

ation under Art. 81 and 82 EC, and equivalent UK provisions, on alleged anticompetitive and abusive price of telephone ser-

tices to hospital patients in spite of long duration exclusivity clause (Patientline, «Premier»), 18 January 2006, e-Competitions, n° 9595Band Joseph Vogel, The French Competition Authority rules that an over-general exclusivity clause in favour of an undertaking in a dominant position prevents access to the market for other potential operators (Titre Cadeaux / Kadéos), 3 March 2010, e-Competitions, n° 30919.


[17] Furthermore, exclusivity may also minimize free-riding in cases where there is no manufacturer supplier tied arrangement se-

riding on manufacturer paid-for promotion to sell rival products, and (ii) free-riding in the form of failing to supply the promotion paid for by the manufacturer altogether, even in the absence of
See, inter alia, B.E. Hawk, "The American (Anti-Trust) Revolution: For a critical view of the current state of the law see, inter alia, the
It should be highlighted, that even after the Commission's last
As Jones and Sufrin indicate, this approach was conceptually
Commission Regulation n° 2790/1999, of 22 December 1999,
See Guidelines on Vertical Restraints, at para. 107(g). In addition, for every extra unit a distributor sells by lowering its resale price or by increasing its sales efforts, the supplier benefits if its whole-
sale price exceeds its marginal production costs. The Commis-
recognizes that there may be a positive externally bestowed on the supplier by such distributor's actions. See, Guidelines on
See Guidelines on Vertical Restraints, para. 107(h).
For a critical view of the current state of the law see, inter alia, the Opinion of Advocate General Maduro Poiares, delivered on 23
See further Aftaro, J., Aguila Real, Professor of Com-
mmercial Law, Universidad Autónoma de Madrid, Presentation of
As Jones and Sufrin indicate, this approach was conceptually
given that the main-objective of any agreement, and in partic-
独家代理：欧盟和国内案例综述

See, e.g., the Decision by the Romanian Competition Authority on 3 January 2012 concerning an exclusive distribution agreement by the

See, e.g., Decision by the Romanian Competition Authority on 9 December 2008 in case nº 95 SC Kraft Foods Romania, S. A.

See, e.g., Decision by the Romanian Competition Authority on 27 April 2009, e-Competitions, nº 25772. See further the Decision by the

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standard distribution agreements in the gastronomic sector subject to commitments alleviating the exclusivity effects of the agreement on the basis of Art. 81/82 EC (Carlsberg), 26 October 2005, e-Competitions, n° 314.


[38] See Ruling by the Bulgarian Supreme Administrative Court on 9 July 2009, Bulgarian Competition Authority v. Iosini Ltd. See Alexandr Stvetcich, The Bulgarian Supreme Administrative Court dismisses the charges of abuse of dominant position launched against domestic tobacco producer (Iosini), 9 July 2009, e-Competitions, n° 29895. For an example of the analysis of single branding agreements in terms of foreclosure outside the E.U. see the Decision of the Spanish NCA in its decision on 3 December 2009 in case S/0105/08 Corral de las Flamenca. See Albert Pereda Miquel, María González Navarrete, The Spanish Competition Authority closes a resale price maintenance case, after applying the de minimis rule (Corral de las Flamenca), 3 December 2009, e-Competitions, n° 32027.


[40] See, e.g., the Ruling by the Hungarian Metropolitan Court of Appeal on 17 November 2010, Case nº2 KD.27.408/2010/5, Kertex Mérkőzés, a Kft v Competition Authority.


[42] See, e.g., the ruling of the Regional Court of Hamburg on 4 December 2007 in Case nº 315 O 923/07 Phone, where the Court pointed out that there may be hardcore restrictions which are not appreciable in cases where the market position of the parties is weak, a position which was afterwards followed by the Spanish NCA in its decision on 3 December 2009 in case S/0105/08 Corral de las Flamenca. See Albert Pereda Miquel, María González Navarrete, The Spanish Competition Authority closes a resale price maintenance case, after applying the de minimis rule (Corral de las Flamenca), 3 December 2009, e-Competitions, n° 32027.


[45] As indicated above, “passive” sales are sales in response to an unsolicited order from customers in that territory or group. This is contrasted with restrictions on “active” sales, meaning active marketing, for example, by targeted advertising, customer visits or mail shots. According to E.U. Competition law, active sales can be restricted into territories or customer groups that have been exclusively allocated to other distributors or expressly reserved to the supplier itself whereas a total ban on passive sales is usually prohibited.


[47] This argument was also recently confirmed in the Pierre Fabre judgment (case C-439/09, Pierre Fabre Dermo-Cosmétique v. Président de l’Autorité de la concurrence, Ministre de l’Économie, de l’Industrie et de l’Emploi, judgment of 13 October 2011). See Joseph Vogel, The European Court of Justice’s rules that absolute bans on Internet sales are prohibited (Pierre Fabre Dermo-Cosmétique), 13 October 2011, e-Competitions, n° 39725. See also cases Yves Saint Laurent perfume (Commission press release IP/01/713; requiring deletion of Internet resale restriction); B&W Loudspeakers (Commission press release IP/02/196; also requiring deletion of Internet resale restriction); and Yamaha (Case COMP/M.37.975, Commission decision of 16 July 2003); obligation to consult supplier before making Internet sales held illegal (at paras. 107-110). See Elodie Clerc, The European Commission fines Japanese manufacturer of electronic musical instruments for restrictions of trade and resale price maintenance in Europe (Yamaha), 16 July 2003, e-Competitions, n° 38907.


[49] A view that seems to have the endorsement of some authors (see, e.g., Alarco, J., The Question is not whether a ‘more economic approach’ is dead or alive, The Question is that it has already reached its limits, unpublished). An exception should perhaps be made for those scenarios where exclusive agreements are used as a device to facilitate other and more serious anticompetitive agreements. But then the rules on horizontal agreements might arguably apply to such cases.
