Vertical Restraints Policy in the EU: Open Questions in the Face of Policy Compromises

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I. Introduction

Although the view is commonly expressed around the world that vertical agreements (between economic operators at different parts of the supply chain) are less harmful to competition than agreements between competitors (at the same level of the supply chain), one of the enforcement priorities of the European Commission ("the Commission") for well over fifty years has been to prevent manufacturers from dividing up the European Union ("EU") by entering into agreements with their distributors not to export goods to another Member State (*i.e.*, geographic segmentation). The emphasis on the enduring need of European competition policymakers to support the realization of the Common Market – and thereby to support intra-brand competition as much as inter-brand competition - has been so strong that their approach to vertical restraints arguably presents the most stark example of the differences in antitrust enforcement between the world's two leading antitrust legal models which dominate global commerce.

Impetus for change

In response to a series of emerging shifts in economic thinking, the institutional administration of competition rules, and commercial practices, the Commission ran a Public Consultation process in the year 2009 with all relevant stakeholders. This consultation process culminated in a significant recalibration of policy objectives in the arena of vertical restraints under EU competition rules which now reflect, *inter alia*:

- changes in the way in which economists consider "efficiencies" to arise from vertical commercial relationships, the need to take a more "effects-based" approach towards restrictions of competition in general, and a more realistic approach as to the types of conduct which infringe Article 101TFEU by reference to their *object* (assessed in a manner more akin to a *per se* violation) or by their *effect* (assessed in their particular factual setting);
- a shift the institutional dynamic between the enforcement practices of the Commission and the National Competition Authorities of the EU Member States adopted since 2004 through the provisions of *Regulation 1/2003*;
- the raising by the European Courts of the standard of proof required to be satisfied by the Commission in those cases where it

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seeks to establish the existence of tacit anti-competitive agreements between firms at different levels of the production/distribution/maintenance value chain;[1]

- significant shifts in value brought to the global marketplace through the rise of the Internet as a means of distributing goods and services, on the one hand, and the recognition that market power is increasingly resting in the hands of large European retailers, on the other; and
- the migration over time of certain markets from a national level to a pan-European level.

Adoption of a new vertical restraints regime

The end result of the Public Consultation process was the adoption by the Commission of a new vertical restraints regime which came into effect on 1 June 2010, made up of an updated set of interpretative *Guidelines on Vertical Restraints* (released on 19 May 2010),[2] having previously approved the revised *Block Exception Regulation 330/2010*.[3] As a result of the changes effected, vertical distribution agreements are now subject to a single overarching block exemption—*Regulation 330/2010*, which replaced *Regulation 2790/1999*,[4] although agreements entered into under the auspices of the vertical restraints regime before the adoption of *Block Exemption Regulation 330/2010* will continue to benefit from the safe harbor originally available to them. This *Block Exemption Regulation* brings together a number of more narrowly defined block exemptions for particular types of distribution,[5] and applies to all agreements which meet the conditions contained in that Regulation. It is due to expire on 31 May 2022.[6]

The operation in tandem of the new *Guidelines* and *Block Exemption Regulation* does not obviate the need for an analysis of the competitive effects of vertical agreements on their own terms, but these instruments do map out the presumptions and analytical framework which the Commission would apply in assessing the compatibility of certain types of agreements entered into between suppliers and distributors.[7] As such, they are supposed to guide firms in their "self-assessment" of whether their vertical practices are enforceable in EU Member State courts.[8] That guidance is all the more important given the fact that the decentralized model of antitrust enforcement set forth in *Regulation 1/2003* means that the old system of pre-notification of agreements exclusively to the Commission has been completely overhauled. Under the new regime, not only are parties involved in distribution relationships expected to have a greater level of understanding of the antitrust principles to be applied in any self-assessment exercise in which they engage, but national courts and regulatory bodies are also required to be more familiar with the application of those principles in the event of the inevitable wave of national litigation that will occur under the new regime.[9]

The recalibration of Commission policies is reflected in the fact that the new *Guidelines* adopt an explicitly more lenient view on vertical restraints than had ever occurred in the past fifty years, explaining that '*vertical restraints are generally less harmful than horizontal restraints…*,' (at para. 6), and requiring that the assessment of vertical restraints be undertaken in the context of the wider objective of achieving an integrated internal market. The new *Guidelines* also represent a shift in competition objectives, based on the application of a sounder economic analysis. Thus, whereas the previous version of the *Guidelines* stated that the main objective of the EC competition policy is to protect competition (at para. 7), the new *Guidelines* shift the 'primary' objectives, by stating that the objective of Article 101 TFEU is to '*ensure that undertakings do not use agreements … to restrict competition on the market…*'.

The new approach reflects the Commission's recognition that certain agreements might be pro-competitive under various factual scenarios, with the agreements themselves not needing to be prohibited *ab initio* in order to protect competition on the market; instead, the effects of the agreements need to be assessed in their own

particular circumstances. This is also consistent with the balancing exercise expected from National Competition Authorities when acting under the auspices of *Regulation 1/2003* in their application of Articles 101(1) and (3) TFEU. Taking these principles into account, the *Guidelines* go on provide guidance on a number of advances in distribution techniques, particularly with respect to the emergence of Internet sales.

The changes effected in June 2010 (discussed in Section III below) have gone a long way towards bridging the significant gap that had existed between vertical restraints policy applied across both sides of the Atlantic (recent US policy developments are discussed in Section II below). However, while it is clear that progress has been made in bringing together the different streams of economic theory, institutional competence and commercial developments, achieving the confluence of these streams reflects a series of policy compromises which are just as easily capable of producing strained legal interpretations and distorted commercial decision-making. As such, they are most prone to different interpretations in practice, and hence likely to generate a wave of litigation across the EU, with manufacturers and distributors likely to be relying on the *Guidelines* both as an antitrust shield and a sword in the face of actions to enforce distribution arrangements.

Guidance from recent case-law

Barely one year after the adoption of the EU's new vertical restraints regime, the European Court of Justice ruled on 31 October 2011, in the *Pierre Fabre Dermo-Cosmétique Case*,[10] that a ban on online sales of skin cream products constituted a restriction of competition "by object" and that, as such, would only be enforceable if that restriction could be objectively justified. According to the Court, online sales could not be prohibited outright simply because the supplier was seeking to preserve its brand image, nor was such a restriction justified because the supplier considered that its creams required on-the-spot advice to be made available to customers. However, the Court did not express its own views on whether the restriction by object could be justified on the basis of the criteria set forth in Article 101(3) TFEU, preferring to leave that decision in the hands of the relevant national court involved in the proceedings.

Given that the genesis of the dispute in this case stems from the time when the Public Consultation on the vertical restraints regime was already underway, and given the fact that national courts continue to have very little guidance on how to apply the criteria listed in Article 101(3) TFEU to a particular factual situation under the new regime, the final resolution of this case before the French courts will hopefully provide practitioners with greater legal certainty as to how to advise suppliers and distributors in anything other than the most straightforward of distribution scenarios.

II. Developments Across the Atlantic

The process of re-evaluating the economic and legal standards by which to assess vertical relationships in the EU that occurred in 2009 took place in the aftermath of the 2007 Judgment of the U.S. Supreme Court in *Leegin Creative Leather Products, Inc. v. PSKS, Inc*, where the Court overruled the longstanding *per se* rule against minimum resale price maintenance ("RPM") agreements.

The rationale of the Leegin precedent

In *Leegin*, the Supreme Court established that the *per se* rule against vertical price fixing established in 1911 in *Dr. Miles Medical Company v. John D. Park & Sons*,[11] was no longer appropriate. The *Dr Miles* precedent had been taken a step further in *United States v. Colgate*,[12] where the Court clarified that the rule did not apply to a seller's unilateral refusal to deal with a buyer that had failed to charge the resale prices suggested by the seller. In addition, while the *per se* rule originally applied to *all* price and non-price vertical resale restraints between buyers and

sellers—such as location clauses, territorial restraints, and customer restraints—over the years the Court adopted the rule of reason as the relevant standard of legal review for all vertical restraints, other than for minimum RPM.[13] Unlike the EU, given that the United States was considered to be an integrated national market with little need for the creation of a "common market", the rationale for the treatment of vertical restraints other than RPM according to a rule of reason lay in the understanding that it was primarily inter-brand competition that should be promoted in order to maximize consumer welfare, rather than intra-brand competition.[14]

By 2007, therefore, it was time for the US Supreme Court to consider whether it was appropriate to extend the rule of reason even to cases of to minimum RPM.[15] After analyzing the developing economic literature, the Court identified several potential pro-competitive benefits of minimum RPM, including the encouragement of retailers to invest in customer service and promotional efforts and the facilitation of market entry for new firms and brands.[16] Rejecting the argument that the *per se* rule should be preserved for its administrative convenience, the Court adopted the rule of reason, holding that, over time courts could "*establish the litigation structure to ensure the rule operates to eliminate anti-competitive restraints from the market and to provide more guidance to businesses*."[17]

Developments post-Leegin

Since the Judgment in *Leegin* was delivered, it has generated much controversy in the antitrust and business communities as to its practical effect, whether among commentators, jurists or legislators. The National Association of Attorneys Generals has been especially vocal in its comments.[18] In response to criticism, U.S. Congress members introduced Bills in the Senate and House of Representatives in 2007 and 2009 proposing to return minimum RPM to *per se* illegal status.[19] Hearings on the final version of the Bill, entitled *The Discount Pricing Consumer Protection Act*, were held in 2009.[20] In connection with the hearings, thirty-eight state Attorneys General submitted a letter to Congress in support of the Bill.[21] By contrast, the American Bar Association opposed the Bill in its own letter to Congress.[22] Neither the 2007 or the 2009 Bills have ultimately become law, but debate regarding *Leegin* has continued and the Bill was re-introduced to the Senate on 25 January 2011.[23] However, with the resurgence of Republicans to the House of Representatives in the last election, a number of commentators have speculated that the Bill has little chance of being passed before the next Presidential election.

While many commentators anticipated that *Leegin* would significantly change the landscape for claims alleging illegal minimum RPM, in many ways the effect in practice of the Judgment has not been as dramatic as originally anticipated. Since *Leegin*, only a few minimum RPM cases have been litigated in Federal Court, none of which have raised any significant new issues. The most notable case has been the remanding of *Leegin* to the District Court in the Eastern District of Texas.[24] On remand, the plaintiffs have alleged a hub-and-spoke conspiracy among Leegin and over 100 of its dealers.[25] The plaintiffs also alleged that Leegin had engaged in a horizontal price-fixing conspiracy at the retail level.[26] The District Court dismissed the plaintiffs' Complaint, holding that: it had failed to plead the existence of a plausible relevant market, as required under the rule of reason; its new horizontal restraint allegations were barred by the mandate rule; and, even if not barred, the horizontal claims failed as a matter of law.[27] The Fifth Circuit affirmed these findings, adding that the plaintiffs had also failed to prove the existence of any anti-competitive effect caused by Leegin's conduct.[28]

Though *Leegin* changed the analytical framework of analysis in federal RPM cases, its broader impact has been limited by the various State antitrust laws currently in force. *Leegin* is expected to have the greatest impact on antitrust enforcement in those States which explicitly look

to federal precedent for guidance in interpreting their antitrust laws. At present, sixteen States statutorily require these State courts to follow federal precedent in analyzing state antitrust statutes.[29] Laws in another six states, plus the District of Columbia, suggest that courts simply use federal precedent as a guide in construing antitrust claims.[30]

Because the statutes in many States encourage courts to look to federal law in assessing antitrust claims, many commentators anticipated that States would amend their antitrust statutes with "*Leegin* Repealers" explicitly disavowing federal law and prohibiting minimum RPM as *per se* illegal. To date, however, only one State—Maryland—has passed such a statute.[31] The Maryland law, enacted on 14 April 2009, forbids any "*contract, combination, or conspiracy that establishes a minimum price below which a retailer, wholesaler, or distributer may not sell a commodity or service*" regardless of its effect on competition.[32]

Although Maryland is currently the only State to explicitly codify its disapproval of *Leegin*, the lack of other "*Leegin* Repealers" is partially explained by the fact that pre-existing antitrust laws in several other States can be interpreted as prohibiting minimum resale price agreements. For example, California law provides that it is illegal to "*fix at any standard or figure*" for any article or commodity "*whereby its price to the public or consumer shall be in any manner controlled or established*."[33] The law also prohibits agreements to "*not sell, dispose of or transport*" any article or commodity "*below a common standard figure, or fixed value*."[34] The States of Kansas, Montana, New Jersey, New York, and Ohio each have similar laws.[35] In addition, laws in at least fourteen other States prohibit price fixing, though they do not make a specific reference minimum RPM.[36]

Armed with favorable State laws, certain State Attorneys General have continued to aggressively litigate minimum RPM cases. The most aggressive State has been New York, which filed at least two high profile RPM cases since the *Leegin* Judgment. In *New York v. Herman Miller*, New York, along with Michigan and Illinois, sued furniture manufacturer Herman Miller in Federal Court, alleging that it obtained agreements from its resellers to comply with its minimum advertised price policy.[37] The case was settled by Consent Decree under which Herman Miller agreed to pay $750,000 as a civil penalty.[38] The case was especially notable because the plaintiffs appeared to proceed under a *per se* approach, as the complaint did not allege that Herman Miller had market power nor that anti-competitive effects outweighed whatever pro-competitive benefits the minimum RPM agreement may have had.[39]

In 2010, the New York Attorney General filed suit in *People v. Tempur-Pedic International, Inc.*, alleging that Tempur-Pedic established a retail pricing policy in which it refused to do business with any retailer who did not adhere to its suggested retail price ranges.[40] While Tempur-Pedic admitted to giving effect to such policies, the Court held that such agreements were merely unenforceable, but not illegal under the New York statute, and granted the motion to dismiss.[41]

The California Attorney General has also aggressively litigated minimum RPM in the wake of *Leegin*. In *People v. DermaQuest, Inc.*, the defendant agreed to pay $70,000 and $50,000 in attorneys' fees after the Attorney General alleged that it prohibited distributors from selling its products below its suggested retail price in violation of California law.[42] Most recently, California settled its suit against Bioelements, Inc. for $15,000 and $36,000 in attorneys' fees after alleging that Bioelements' dealers contracted not to sell products for less than the manufacturer's suggested retail price.[43]

To date, the campaign by State Attorneys General in the wake of the *Leegin* precedent has been very effective in discouraging minimum RPM agreements. Most firms continue to avoid such arrangements because of the risk of enforceability at the State level and also because they are able to achieve their marketing goals by other

means, including policies based on the *Colgate* precedent and minimum advertised pricing programmes. Thus, even though the Department of Justice and most States now accord the rule of reason treatment to minimum RPM, the handful of States (including, California and New York) which continue to zealously prosecute RPM, coupled with the need of many firms to implement nation-wide promotional policies, has discouraged most firms from executing minimum RPM policies.

Impact of the Leegin rationale in the EU

As controversial as the precedent in *Leegin* may be, it has found itself a very close counterpart in the manner in which the EU now treats RPM situations under the new vertical restraints regime which applies in the EU.[44] Moreover, when one considers that the logic of *Leegin* resonates with the protection of prestige brand products, the logic underpinning the distribution of goods in the EU *via* a system of "selective distribution" (see discussion in Section IV) has led openly to a system of price rigidity which would in practice result in similar outcomes to that proposed under the *Leegin* precedent.

III. Principle Changes to the EU Vertical Restraints Regime

1. Introduction

Given the policy drivers which dominated the 2009 Public Consultation process, the chief features of the new vertical restraints regime introduced by the *Block Exemption Regulation* and its accompanying *Guidelines* are:

(i) clarifications as to which types of agreements fall outside the scope of the safe harbour provided under the Block exemption regime;
(ii) fundamental modifications to the scope of the "safe harbour" regime, including: (a) extending the 30 percent threshold from the supplier to the buyer also; and (b) the specific treatment afforded to the "hardcore" restrictions under the *Block Exemption Regulation*;
(iii) the treatment of agency relationships in the context of vertical relationships;
(iv) the specific rules developed with respect to Internet sales;
(v) the new approach developed in relation to Resale Price Maintenance ("RPM"); and
(vi) reflections on the compatibility of emerging vertical commercial practices in light of the Commission's new priorities in the field of vertical restraints.

The new *Guidelines* reflect not only changes in case-law and legislative developments of the past decade, but also seeks to reflect the changes that have occurred in business practices over the past ten years. In examining the new features of the vertical restraints regime, the most significant changes between the new 2010 regime and the regime which prevailed in the year 2000 in the *Guidelines* and under the *Block Exemption Regulation* 330/210 are reflected in the Annex to this paper.

2. Clarifying the Scope of the Block Exemption

The precise parameters of the "safe harbor" provided under the *Block Exemption Regulation* have been clarified in a number of important respects, namely, by:

- explaining that commercial conduct that is non-consensual between a supplier and a distributor is not caught by *Block Exemption Regulation 330/2010*;
- clarifying which agreements are likely to have such a small impact on competition on the market, by virtue of the limited turnovers affected by the transaction in question, as to not require the safe harbor protection afforded by the *Block Exemption*;
- the specification of which types of vertical distribution arrangements between competitors are capable of benefiting from the terms of the *Block Exemption*;

- the exclusion from the scope of the *Block Exemption* of those vertical relationships which involve predominantly the licensing of intellectual property rights; and
- the role of *Block Exemption Regulation 330/2010* where other block exemption instruments might cover the same subject-matter in question.

The exclusion of unilateral conduct

Paragraph 25 of the new *Guidelines* establishes that there are three elements which define the sort of "vertical agreement" which is covered by the EU regime. The previous *Guidelines* listed three elements, namely: (1) an agreement between two or more parties;[45] (2) where that agreement is between parties operating at different level of the production/distribution chain; and (3) the agreement relates to the conditions of the purchase, sale or resale of certain goods or services.[46] In response to developments in European case-law, the new version of the *Guidelines* has amended the definition of "vertical agreements" to include an additional element, namely, that the *Block Exemption Regulation* 330/2010 applies to agreements and concerted practices, but does *not* extend to unilateral conduct of the concerned party.[47]

Unilateral anti-competitive conduct of a firm might fall within the scope of an Article 102 TFEU action for the abuse of dominance. However, in order for an agreement to fall within the scope of Article 101 TFEU, and hence be considered in light of *Regulation 30/2010*, the agreement must reflect the *mutual intention* of all the parties to carry out the conduct in question. The Commission bears the burden of proof, where there is no explicit agreement to engage in the joint conduct in question, to establish that the unilateral policy of one party has been accepted (from the responsibilities allocated between the parties in the general agreements) or acquiesced in by the other party, where that acceptance or acquiescence is necessary to achieve the objects of the policy in question.

Limited market impacts

In 2001, the Commission adopted the so-called *De Minimis Notice*[48] which classifies particular agreements as 'agreements of minor importance.' In the *Notice*, an agreement in which each individual party which is involved in a vertical agreement holds a market share of less than 15 percent on any of the relevant affected markets is classified as an agreement of minor importance. These 'agreements of minor importance' are presumed not to be capable of restricting competition within the meaning of Article 101(1) TFEU. The *De minimis Notice* also draws a distinction between horizontal and vertical agreements, by setting the exception at a level of 10 percent individual market share for those parties involved in horizontal agreements. This distinction reflects the more liberal review taken by the Commission as regards the competitive impact of vertical agreements when compared to horizontal agreements.

Under the previous version of the *Guidelines* (at para. 9), parties entering into vertical agreements with individual market shares less than 10 percent of the relevant market were presumed to fall outside of the scope of Article 101(1) TFEU. The new *Guidelines* have now been amended to reflect the adoption of the *De Minimis* Notice, increasing the market share threshold from 10 percent to 15 percent, therefore categorizing vertical agreements between parties with individual market shares of between 10-15 percent as 'agreements of minor importance'. This has the potential to lower the number of agreements which, prior to the amendments, would have otherwise been assessed on a case-by-case basis, and is particularly important in relation to those agreements which are not covered by *Block Exemption Regulation 330/2010*.

The *de minimis* threshold is based on the market share enjoyed by the party in question,

and is not related to its individual level of turnover. Therefore, a large firm with a high turnover but low market share – particularly in a highly saturated market – may fall under the 15 percent market share threshold and take advantage of the terms of the *Notice*. The provision, in both the previous version and new *Guidelines*, makes it clear that having an individual market share over the relevant share threshold on the relevant market will *not* lead to a presumption of illegality under Article 101(1) TFEU. An individual assessment into possible appreciable effects and restrictions on competition will therefore need to be carried out by the Commission before an antitrust infringement can be established. In addition, any agreements which fall within the 'hardcore' restrictions category, regardless of the relevant party's market share, will not be excluded from an individual competitive assessment.

Vertical agreements between competitors

Article 2(4) of *Block Exemption Regulation 330/2010* provides that the safe harbor exemption does not apply to vertical agreements between competing parties other than those entered into on a *non-reciprocal* basis. In these more limited circumstances, the vertical relationship can benefit from the terms of the *Block Exemption* where the supplier is a manufacturer of competing goods, or where the supplier is the provider of services operating at various functional levels of the market and the buyer operates at the retail level.[49]

On the understanding that a relatively limited turnover might not necessarily equate to a lack of market power where the relevant market is relatively narrowly defined, the new *Guidelines* eliminate the previous requirement that the buyer be limited to have a turnover which does not exceed €100 million.

The concept of "competing" parties is understood to include both actual and potential competitors on the same relevant market (see Article 1(1) (c)).

Intellectual property licensing

Regulation 330/2010 will not apply to vertical agreements which include the assignment or licensing of intellectual property rights other than those situations where the intellectual property licensing or assignment does not constitute the "*primary object*" of the agreement and where the it is directly related to the use, sale or resale of goods or services by the buyer or its customers (and does not include any hard-core restrictions of competition) (Article 2(3)). The meaning of the expression "primary object" is not clarified in any meaningful way by the idea that "ancillary provisions on the assignment of use of intellectual property rights" will be considered to fall within the terms of the *Block Exemption* (see Recital 3).

While the policy direction behind such an exclusion from the scope of the *Block Exemption* may be clear, its application in complicated distribution relationships where intellectual property rights lie at the heart of the commercial relationship is anything but clear-cut. In order to address any possible interpretative difficulties that might arise, the Commission sets forth a number of observations in its *Guidelines* designed to clarify particular applications of the general principle.[50] For example:

(i) Whereas the *Guidelines* specify that *Block Exemption Regulation 330/2010* will *not* apply to those agreements "*where a party provides another party with a recipe and licenses the other party to produce a drink with this recipe*", they nevertheless conclude that a license to dilute and bottle a concentrated extract for a drink prior to its sale as a drink *is* covered by the *Block Exemption*.[51] Despite the existence of a range (and fairly dated) set of Commission precedents which shed some light on the issue of whether a particular commercial relationship should be considered to be "ancillary" to another,[52] it is odd that the treatment of the perennial "bottling problem" should ultimately turn on whether or not a "recipe" has been provided by the licensor to the licensee.

(ii) The *Guidelines* also indicate that, in the context of franchising relationships, "*industrial franchising*" (at para. 34) should in principle fall outside the scope of *Block Exemption Regulation 330/2010*, whereas the logical inference from the structure of the *Guidelines* is that distribution and service franchising relationships should fall within the terms of the *Block Exemption*. The rationale for this exception is anything but clear and, in order to provide some comfort that different standards of antitrust review should not apply to different categories of franchising agreement, the Commission states that the Commission will apply the principles set forth in the *Block Exemption* and the *Guidelines* "as a general rule" to industrial franchise relationships (at para. 44).

(iii) The *Guidelines* (at para. 34) specify that the *Block Exemption* does not apply where the transfer of intellectual property rights is made by a supplier to a subcontractor, based on the rationale that such an assignment of rights is not compatible with the vertical relationship being one where the transfer of intellectual property is merely ancillary to the principal distribution function (Article 2(3) of *Block Exemption Regulation 330/2010*).

The impact of other "safe harbor" instruments

Where the subject matter of vertical agreements "falls within the scope of application of any other block exemption regulation", *Block Exemption Regulation 330/2010* provides that the safe harbour under Article 2(1) does not apply (Article 2(5)). In practice, given that *Block Exemption Regulation 330/2010* incorporates so many specific forms of distribution arrangements within its scope, this means in practice that *Block Exemption Regulation 772/2004* might apply to intellectual property licensing relationships, while *Block Exemption Regulation 461/2010* would apply to motor vehicle distribution issues not covered by the provisions of *Block Exemption Regulation 330/2010* (especially as regards aftermarket sales restrictions).

3. *Extending the Depth of the "Safe Harbour" (applying the 30 percent threshold to buyers also)*

The amendment which arguably has the greatest impact on vertical business arrangements involves the extension of the market share threshold for the application of *Block Exemption Regulation 330/2010* (Article 3(1)). Under the previous version of the *Guidelines* and the *Block Exemption Regulation*, it was only the market share of the supplier which triggered the application of the *Block Exemption Regulation*. The buyer's market share was not seen as being relevant when determining the application of the *Block Exemption Regulation*. However, this view has changed, given the supposed application of a more economically oriented approach which takes into account the increase in the buyer power of large distributors and retailers. In response to these types of concerns, the new *Guidelines* (at para. 83) require the Commission to assess both the market shares of the supplier and the buyer when determining whether the 'safe harbor' threshold has been fulfilled. Thus;

> *"Both the market share of the supplier, on the market where it sells the contract products to the buyer, and the market share of the buyer, on the market(s) where it (re)sells the contract products, may not exceed 30 percent in order to be covered by the Block Exemption Regulation."*

If the market share of the buyer *and* the supplier exceed 30 percent,[53] the agreement is not automatically deemed illegal, but the *Block Exemption Regulation* does not apply and the agreement will need to be assessed on its own individual merits. At the same time, while an individual assessment on the likely effects of the agreement will be required, a Competition Authority such as the Commission or a National Competition Authority would bear the burden of proving that the agreement infringes Article 101(1) TFEU.

Commentators such as De Stefano have cautioned against this narrowing of the *Block Exception Regulation*, which is an extension of

the approach which was previously taken in relation to exclusive supply arrangements but which now extends to all vertical agreements falling within the safe harbor. In particular, she warns that the utility of the safe harbor will be reduced by virtue of the difficulties faced by parties attempting to measure shares in a purchasing market.[54] By contrast, a commentator such as Lianos takes the view that the new threshold regime should be welcomed because it places greater emphasis on retailer market power, which had been neglected in the past.[55] In this regard, Lianos describes retail market power as "a filter to the application of the new block exemption", which is complemented by the *Guidelines*' new focus commercial practices such as up-front access payments and category management (discussed below).

The 30 percent threshold applies to the buyer's market share only in relation to the *relevant market* affected by the agreement, or on the market upon which it purchases the relevant goods and services where the vertical agreement in question contains exclusive supply obligations. The wording reflects a change after the Consultation phase from the original proposal of the Commission, which had proposed originally that the buyer's market share be calculated on the downstream market. That downstream market shares approach was departed from essentially because of the inherent difficulties in a supplier being able to calculate such shares on the part of buyer, especially since downstream markets are capable of being drawn quite narrowly and because a supplier might have little direct knowledge of such markets.[56]

According to the new *Guidelines*, market share will be calculated on the basis of market sales value data (Article 7(b)). In this regard, the Commission has deleted the previous provision calling for market share to be based on the contract goods or services, or other goods and services sold by the supplier which are comparable or substitutable. Where the market sales value is not available, the estimates must be based on other reliable market information such as sales volumes. Similarly, market share calculations should include sales made through independent distributors and through distributors which are vertically integrated with the supplier (Article 7(c)). The new *Guidelines* have also deleted the provisions regarding the differences that might exist as between the assessment of intermediate products, final products, and after-market products and services.

4. *Falling Outside the "Safe Harbour" Regime – Agency Agreements*

Section II (2) of the *Guidelines* addresses explains the situations where agency arrangements[57] should be treated under the new vertical restraints regime. Article 101(1) TFEU only applies to agreements entered into between two or more *independent* parties,[58] and therefore does not apply to an agency agreement situation where the businesses of the principal and the agent are closely integrated. Competition regulators will therefore need to assess the independence of the agent when considering the compatibility of vertical agreements under EU antitrust rules, and this needs to occur on a case-by-case basis.

The treatment of agency relationships reflects the more restrictive case-law developed over the past decade which considered the applicability of Article 101(1)TFEU to agency agreements.[59]

Under the previous version of the *Guidelines*, there were only two types of risk considered in the assessment of whether an agency relationship could be established. For example, the Commission will assess the contracts negotiated by the agent on behalf of the principal, and also any investments that are considered to be market-specific. The new *Guidelines* have expanded the level of assessment required, in alignment with developments that have taken place in the case-law, to include a third type of financial or commercial risk relevant to the independence of the agent, namely: the financial or commercial risks associated with the resale or repair services provided in relation to the

product, insofar as those activities are indispensible and the agent undertakes such activities independent of the principal. In *Mercedes-Benz*,[60] for example, the Commission considered the commercial risks associated with the Mercedes-Benz agent in Germany which offered a workshop, emergency services, and a stock of spare parts for repairs. The commercial risks associated with the repair services classified the agent, Mercedes-Benz, as having undertaken activities that may have been essential for the product but which had not been effected on behalf of its principal, DaimlerChrysler. In the circumstances, it was therefore not considered to be an "agent" for antitrust purposes.

The new *Guidelines* (at para. 17) now provide further guidance on the appropriate approach to be taken when assessing risks in connection with agency arrangements. *First*, if contract-specific risks are incurred by the agent, the agent is considered to be an independent distributor. If there are no contract-specific risks borne by the agent, the analysis will continue with the assessment of the risks related to the market-specific investments. If the agent does not incur any risks related to market-specific investments, the risks related to other required activities are then taken into consideration, to the extent that they are indispensable for them to act as an agent on behalf of the principal.[61]

The logic of the Commission's shift in approach to assess market-specific risks is further elaborated upon by a number of Commission officials,[62] who submit that a party wishing to be characterized as an agent should not be present on the same market as both an agent and an independent distributor, since this would allow the agent to leverage its relationship with the principal to acquire greater market power as an independent distributor. These "spill-over effects" of intra-brand restrictions could, in addition, allow price-fixing to occur as between the agency activities and independent distributor activities.

5. *The Treatment of "Hardcore" Restrictions under the Block Exemption Regulation*

The traditional approach of EU antitrust rules to "hardcore" competitive restrictions (*i.e.*, tantamount to a *per se* offence in US terms) in a distribution agreement that cannot otherwise benefit from the terms of a *Block Exemption* renders that agreement or specific restrictions in it both unlawful under Article 101(1) TFEU and unenforceable under Article 101(2) TFEU, at least to the extent that it affects trade between Member States. However, if the effects of the "hardcore" restriction are clearly confined to the territory of a single EU Member State, the agreement might escape the reach of EU antitrust rules, but will still need to be assessed under national competition rules.

Block Exemption Regulation 330/2010 and the *Guidelines* provide a list of hardcore restrictions of competition, which will prevent the entire agreement from obtaining the benefit of the *Block Exemption* due to the high probability of negative effects on competition flowing from the particular restriction in question. The new *Guidelines* have provided a number of changes to the previous list of hardcore restrictions, largely in response to recent case-law and to significant changes within the market that have taken place over the past decade, particularly the increase in business conducted over the Internet and how it affects competition within the relevant market. The revised list of hardcore restrictions in Article 4 of Block Exemption Regulation 330/2010 refers to:

- Restrictions on the sales of goods or services at minimum prices, namely, Resale Price Maintenance (RPM) obligations.
- Restrictions on sales to certain territories and to certain customers.
- Restrictions on cross-sales between members of a selective distribution system.
- Restrictions on retailers' sales to end-users under selective distribution systems.

- Restrictions imposed on suppliers of components in selling their components to independent repairers or service providers.

The Commission has therefore re-caste the provision regarding the treatment of hardcore restrictions under the *Block Exemption Regulation*, so as to clearly explain the nature of the legal presumption that applies when a hardcore restriction is included in an agreement (at para. 47). Where a hardcore restriction is included in an agreement, a presumption arises that the agreement will fall within the scope of the prohibition contained in Article 101(1) TFEU and that it is unlikely to fulfill the requirements for an exemption under Article 101(3) TFEU. This will, in turn, result in a finding of anti-competitive conduct which infringes Article 101 TFEU. The new *Guidelines* explain that such a presumption is *rebuttable*, and does not amount to *per se* illegality. The parties in question bear the burden of rebutting the presumption and are afforded the opportunity to plead their individual case. At that point, the Commission or a National Competition Authority will need to assess the likely negative effects of the agreements, as opposed to presuming their negative effects on competition. This opportunity for the parties to plead an efficiency defense under Article 101(3) TFEU furthers the recent policy endorsed by the Commission that economic assessments are necessary before concluding whether the conditions of Article 101(3) TFEU have been fulfilled.

As De Stefano has noted,[63] the language of "presumptions" is new to the Commission's treatment of hardcore restrictions. In the past, it was assumed that hardcore restrictions were restrictive of competition by object, which were largely synonymous with *per se* antitrust restrictions identified in the United States. De Stefano suggests that the use of the term "presumption" creates a particular clash with the burden of proof incumbent upon the Commission or upon National Competition Authorities to demonstrate that infringements of Article 101(1) TFEU have occurred. On the other hand, De Stefano notes that the Commission's acknowledgement of the possibility that hardcore restrictions might fall outside the scope of Article 101(1) TFEU is a significant policy advance, particularly as regards restrictions on so-called "passive" (*i.e.*, unsolicited) sales outside an allocated distributor's territory.

a. Resale Price Maintenance

The Commission includes in the new *Guidelines* (at para. 219) a section on the analysis of resale price restrictions, which replace the original section on 'recommended and resale prices.' Resale The Commission treats as hardcore restrictions those RPM agreements that restrict a buyer's ability to determine its sales price, whether directly or indirectly, either by obliging them to sell at a fixed price or not to sell below a minimum price (Article 4(a)).[64] It is presumed that such agreements will result in a restriction of competition within the meaning of Article 101(1) TFEU, and will not usually be able to fulfill the criteria set forth in Article 101(3) TFEU (as discussed in para. 47). Where such an anti-competitive presumption flows from a hardcore restriction, the affected parties will have the opportunity to rebut the presumption by demonstrating to a National Competition Authority (or the Commission, as the case may be) that the resale price maintenance agreement fulfills all the required conditions outlined in Article 101(3) TFEU. The effects of the agreement on competition, both positive and negative, will then need to be weighed and balanced against one another.

The new *Guidelines* provide clear examples as to how resale price restrictions might restrict competition, by facilitating collusion between suppliers and leading to the elimination of intra-brand price competition. In addition, as with the other references to specific vertical restraints, the new *Guidelines* explain how those same agreements may lead to efficiencies and how they can assist distributors in their promotional efforts.[65] These sorts of pro-competitive

benefits are usually realizable in the short-term, although the Commission has expressed the view that it will also be willing to look at the possible long-term negative effects of such a commercial practice. The *Guidelines* also instruct the Commission to assess if any monitoring mechanism is in place and if there is any possibility of retaliation against a deviating distributor from the practice. This provides another example of where the new *Guidelines* require the Commission to conduct a thorough assessment of the impact of the vertical agreements in their broader context so as to be able to weigh up both the likely negative and positive consequences of RPM.

In the adoption of this approach by the Commission, commentators such as Lugard and Van Dijk[66] have pointed to the difference of methodology adopted by the US Supreme Court, in contrast to the approach adopted by the Commission. They characterize the Commission's approach to RPM as "empiricist", while they consider the approach of the US Supreme Court in *Leegin* to be more "theoretical" in its analysis. Lugard and Van Dijk also question the persuasiveness of the economic literature endorsed by the Commission, which emphasizes that a fall in prices for consumers justifies the prohibition of RPM. They attribute falls in prices to an outward shift in the demand curve, which does not necessarily result in long term consumer welfare gains.

b. Territorial/Customer Sales Restrictions: The Special Case of Internet Sales and Common Market Policy

Any direct or indirect restrictions imposed on a buyer to either sell into a territory not allocated to them or to certain customers are treated as hardcore restrictions under Article 4(b) of Block Exemption Regulation 330/2010, unless one of four exceptions can be established:

1. *Active sales into the exclusive territory or to an exclusive customer group reserved to the supplier or allocated by the supplier to another buyer, where such restriction does not limit sales by the customers of the buyer.*

This exception relating to *territorial restrictions* reflects the longstanding EU policy that, although territorial exclusivity conferred upon a distributor should allow some degree of protection for the investment expended to penetrate a market in exchange for the grant of that exclusivity, the territorial protection afforded to the distributor could not be absolute, insofar as they could not be prevented from making so-called "passive" sales (but could be prevented from making "active" sales into another territory or directed to a particular category of customers allocated to other distributors or the supplier itself). The previous version of the *Guidelines* defined "passive sales" as those sales "*responding to unsolicited requests from individual customers, including the delivery of goods or services to such customer*." This is in contrast to 'active' selling, which includes sending unsolicited e-mails to individual customers. While the new *Guidelines* do not amend the definition of passive selling, they do include examples of hardcore restrictions with respect to passive selling in the context of sales made over the Internet.

Over the past decade, the Internet has developed into a significant distribution mechanism for many firms. A large number of suppliers and distributors fulfill their orders through the Internet and utilize the Internet to reach potential clients all around the world. This was not the situation when the previous version of the *Guidelines* was drafted, with the new *Guidelines* having amended the provisions to adapt them to current business trends and needs. Thus, the new *Guidelines* now provide guidance on the use of the Internet in relation to the application of the hardcore restrictions found in Article 4(b) of *Block Exemption Regulation 330/2010* with respect to the protection of exclusive territories.

Given that the sales made online are generally considered to fall into the "passive sales" category,[67] the new *Guidelines* (at para. 52) treat the following practices as amounting to hardcore restrictions on passive selling, namely, where they require:

(i) an exclusive distributor to prevent customers located in another (exclusive) territory from viewing its website or requiring the distributor to put on its website automatic re-routing of customers to the manufacturer's or other (exclusive) distributors' websites;
(ii) an exclusive distributor to terminate consumers' transactions over the Internet once their credit card data reveal an address that is not within the distributor's (exclusive) territory;
(iii) a distributor to limit the proportion of overall sales made over the Internet; and
(iv) a distributor to pay a higher price for products intended to be resold by the distributor online than for products intended to be resold offline.

The characterization in the *Guidelines* of all of these restrictions on passive sales as being "hardcore" restrictions of competition is a direct response by the Commission to concerns expressed over the increased significance of sales over the Internet and the lack of regulation of these agreements in the previous versions of the *Guidelines* and the *Block Exemption Regulation*. The changes will affect many online firms which supply or distributor only through the Internet. They will result in more restrictions on the types of provisions that are permissible in distribution agreements, and should help to maintain a competitive market.

However, acknowledging that there may be legitimate instances where a supplier may need to subject the resale of its products to some legitimate form of quality/health/safety standard, the Commission expresses the view (at para. 54 of the new *Guidelines*) that an outright ban on Internet or catalogue sales will not be considered to constitute a hardcore restriction as long as the restriction does not restrict competition *that would otherwise not have taken place* in its absence. This is reserved primarily, for example, for restrictions on the sale over the Internet or by mail order of goods such as dangerous substances, given the safety or health concerns attached to such sales. In any event, any such restrictions must be based on the adoption of proportionate quality standards, given the nature of the concern being addressed and the policy priority of not dissuading customers from sourcing products over the Internet (at para. 56).

In order to assist those new distributors which have made substantial investments to start up and/or develop a new market, and where those investments are considered to be necessary; the new *Guidelines* consider that restrictions on passive selling by other distributors into the exclusive geographic territory or to particular customer groups to fall outside the scope of Article 101(1) TFEU for a period of *up to two years* in which the distributor is selling in this territory or to a particular customer group (at para. 61). This exception is designed to prevent large distributors or retailers, which might otherwise be able to easily transition into the new market, from foreclosing a new entrant or erecting entry barriers to thwart that new entrant.

The exception relating to the prevention of active sales to the *designated customers* of the supplier or other distributors, where those customer s have been exclusively allocated to another distributor or exclusively reserved to the supplier (Article 4(b), para. 51 of the *Guidelines*), reflects the position taken in the Block Exemption in force for intellectual property licensing. The exception applies regardless of whether or not the protected customers are actually being served at the time of the contract, it being sufficient that the customer group has been identified clearly in advance. Clearly, this requires a degree of forward planning by the

supplier so that the designated customers can be readily identified in advance of any parallel sales taking place. In any event, the designated customers of the supplier must not be prevented from engaging in further resale.[68]

The impact on selective distribution

Marsden and Whelan have identified a number of inconsistencies in the Commission's approach to online retail sales, as elaborated in the new *Guidelines*, and the Commission's broader rules on selective distribution.[69] In particular, they consider that suppliers should be allowed to impose qualitative conditions on distributors' use of online selling provided that such conditions are similar in nature to those imposed in relation to bricks-and-mortar shops, since the interests to be protected are the same. Marsden and Whelan further suggest that the prominence and utility of online retail raise doubts as to the legality of selective distribution *per se*, in its ability to act as a pro-competitive market mechanism.[70] Indeed, they suggest that selective distribution means that "*consumers are forced to pay a premium in order to prevent free-riding and to maintain the integrity of the system: the balance is struck in favour of customers who value the mandated service*."[71] Dethmers and Posthuma de Boer have also drawn attention to possible tensions in the Commission's approach to Internet selling in the new vertical restraints regime, especially insofar as the classification of the Internet's commercial use for passive sales conflicts with the Commission's broader policy objective of promoting the Internet as a business tool.[72]

The limits on restrictions of online sales for luxury brand or technologically advanced products becomes particularly problematic in an online environment, where both types of goods would otherwise attract a premium price in a "bricks-and-mortar" store environment run under the auspices of a selective distribution system.[73] In this context, it is inevitable that interpretative questions will arise as to whether a supplier is acting appropriately in setting minimum requirements for bricks-and-mortar sales (para. 52 of the *Guidelines*), in engaging in any dual pricing policies which discriminates in terms of the prices at which goods are available in their respective online and offline environments (para. 62 of the *Guidelines*), and even in the exclusion of those resellers who might be distributing goods exclusively over the Internet (see paras 176-179). It is inevitable that the promotion of the Internet as an important medium for sales, while at the same time preserving the sanctity of selective distribution systems, is fraught with difficult questions of interpretation which national judges will no doubt be called upon to resolve.

2. *Restrictions on wholesalers from selling to end-users*

It has been longstanding practice that restrictions on a wholesaler from selling directly to end customers are a legitimate restriction of trade, insofar as this has been interpreted as a practice which does not infringe Article 101(1) TFEU.[74] Consequently, its express exclusion from the list of hardcore restrictions in Article 4(b) is consistent with that practice.

3. *Restrictions of sales to unauthorized distributors within a selective distribution system*

It is also legitimate under Article 4(b) of *Block Exemption Regulation 330/2010* for a supplier to restrict a distributor which is a member of its selective distribution system from selling to any other reseller other than those distributors forming part of its selective distribution network.[75] The legitimate restriction on cross-supply to members of the selective distribution network is said to apply to those territories where the supplier currently operates through a selective distribution network or where it has not as yet sold its contract products.[76] Unless a franchise falls outside the *Block Exemption* regime altogether because the licensing of intellectual

property is characterized as the primary driver of that relationship (see discussion earlier), the rationale regarding restrictions on cross-supplies should apply with equal effect in the franchising context.[77]

4. Sales of components supplied for the purposes of incorporation into another product

Article 4(b) of *Block Exemption Regulation 330/2010* provides a limited exception to the principle that a distributor should not be restricted to whom it sells, by providing that a supplier is able to restrict a distributor from reselling goods to parties who would incorporate those products as components in a product in relation to which there is competition with goods manufactured by the supplier. The restriction must not go beyond this limited exception.

c. Other Hardcore Restrictions of Competition

Aside from key hardcore restrictions relating to RPM and territorial restraints, Article 4 of Block Exemption Regulation 330/2010 also prescribes three other practices in relation to which a rebuttable presumption will exist that they are likely to produce anti-competitive effects that are unlikely to satisfy the terms of exemption set forth in Article 101(3)TFEU. These presumptively anti-competitive relate to:

Cross-sales between members of a selective distribution system

Article 4(d) of the Block Exemption Regulation explicitly classifies the restriction of cross-supplies between authorized distributors within a selective distribution system as a hardcore restriction. This provision, which has been carried over from the 1999 Block Exemption Regulation, bans not only cross-supplies between distributors at the same level of the value chain, but also includes "distributors operating at different level of trade." As the *Guidelines* clarify, "*selected distributors must remain free to purchase the contract products from other appointed distributors within the network, operating either at the same or at a different level of trade.*"

Retailers' sales to end-users under selective distribution systems

Article 4(c) has also been preserved from the 1999 Block Exemption Regulation. This Article, which could be regarded as one of the cornerstones of the Commission's approach as regards selective distribution, forbids the restriction of active or passive sales to end users, whether professional end users or final consumers, by members of a selective distribution system operating at the retail level of trade. By doing so, the Commission aims at clearly differentiating selective distribution from exclusive distribution, both of which are individually allowed, but whose combination would lead to a hardcore restriction as expressly stated in paragraph 57 of the Guidelines.

In this respect, it must be noted that, while making it clear that the end-users to whom the authorized distributors — within the selective distribution network — sell can in no way be restricted, the Commission also underlines the need for protection of the selective distribution networks, by clarifying that the removal of the limitations on existing active or passive sales is "*without prejudice to the possibility of prohibiting a member of the system from operating out of an unauthorized place of establishment*."

This provision is of key importance to Internet sales, given that, by including passive sales into the hardcore restrictions, the Commission is flagging as "hardcore" any restrictions imposed on authorized distributors which are not "*overall equivalent to the criteria imposed for the sales from the brick and mortar shop*", in particular, as regards the objectives pursued and the results achieved.[78]

Suppliers of components in their dealings with independent repairers or service providers

Similar to the approach taken in relation to the two hardcore restrictions mentioned above,

the hardcore restriction regarding sales of components, contained in Article 4(e), was also included in the 1999 Block Exemption Regulation — albeit with a slight modification in its wording. Even if, according to Article 4(b) buyers may be prohibited from selling components to competitors of the supplier, according to Article 4(e) suppliers cannot be banned from selling components as spare parts to end-users or to repairers or other service providers simply because they have not been entrusted by the buyer with the repair or servicing of its goods. In this respect, it is worth noting that, while restrictions of sales by the buyer or its customers fall, in principle, under the hardcore restriction category, restrictions on the supplier's sales are not considered to fall in and of themselves within the exception provided by Article 4(e).

6. *Enforcement Policy in Individual Cases*

In Section VI of the new *Guidelines*, the Commission lays out the framework of analysis for whether an agreement that might not be otherwise qualified to benefit from the safe harbor provided by the *Block Exemption Regulation*, is caught by Article 101(1) TFEU, and if the cumulative conditions for Article 101(3) TFEU can be satisfied. This Section of the *Guidelines* has been updated to reflect legislative changes, in particular the adoption of *Regulation 1/2003* in 2002.

As laid out in para. 92 of the new *Guidelines*, the individual parties must assess the likely effects of their own agreements with respect to whether competition will be capable of being restricted and will thus fall within the prohibition on anti-competitive agreements or practices contained in Article 101(1) TFEU. As noted above, the adoption of *Regulation 1/2003* has eliminated the necessity of a notification of the relevant agreement to the Commission by parties who wish to benefit from the exemption afforded by Article 101(3) TFEU. However, while no longer being obliged to notify their agreements, any party claiming to be able to benefit from Article 101(3) TFEU will bear the burden of proving that all the required conditions set forth in that provision[79] have been fulfilled. If the likelihood of anti-competitive effects resulting from the agreement can be demonstrated, the parties may justify the restrictions contained in the agreement by reference to its ability to benefit consumers without eliminating effective competition.

The Commission, in para. 93 of the new *Guidelines*, observes that it should assess a vertical agreement by comparing the actual or likely future effects that will occur due to the agreement within the relevant market as against the situation that would prevail in the absence of the vertical restraints in the agreement (the "counterfactual").

The new *Guidelines* clarify which types of effects constitute negative and positive effects for the assessment of a vertical agreement. These types of clarifications will hopefully assist individual parties when self-assessing the compatibility of their agreements with EU antitrust rules and will possibly lead to greater legal certainty for those parties when entering into such agreements. It also provides clear guidance from the Commission to Member State Competition Authorities in order to ensure consistency in approach in the assessment of vertical agreements throughout the EU.

Block Exemption Regulation 330/2010 also lists two types of clauses which, while falling outside the terms of the safe harbor exemptions, require a separate assessment because – unlike the hardcore restrictions whose lack of enforceability might jeopardize the enforceability of the whole agreement in which they included - their enforceability is a matter which does not taint the enforceability of the remainder of the agreement in question. In the case of **non-compete obligations**[80], the rule established is that such clauses are enforceable if they do not exceed five (5) years,[81] except where they prevent members of a selective distribution system from selling the products of competing manufacturers.[82] The approach of the Commission to **post-term competition bans** is that they are enforceable

if they are of only one year's duration post termination of the contract, they are also limited in terms of relating to the contract goods and the premises from which the distributor operated during the contractual term, and are indispensible to protect to technology transferred by the supplier.[83] Beyond this period, it remains open to the parties to argue that a longer period of protection might be justified in light of the know-how that has been transferred to the distributor during the life of the contract and continues to remain secret and proprietary.[84]

a. Analysis of Other Specific Vertical Practices

The earlier version of the *Guidelines* provided an analysis and example of the most common competitive restraints and combinations of vertical restraints which arise within vertical agreements. The new *Guidelines* have expanded this analysis (starting at para. 124), by including an analysis of the possible effects of up-front access payments and category management agreements, with both practices reflecting a concern about market power in the hands of a buyer.

b. Up-front Access Payments

The new *Guidelines* include a new section on up-front access payment (at paras 203 – 208), which are fixed fees that suppliers pay to distributors at the beginning of the relevant contract period in order to gain access to their distribution network and to remunerate them for services provided to the suppliers by the retailers. While recognizing that these types of arrangement might also lead to the efficient allocation of shelf-space at supermarkets (see paras 207-208), it is also understood that these types of payments might contribute in certain circumstances to the anti-competitive foreclosure of other distributors, at least where the payments have the effect of encouraging a supplier to distribute its products through only one or a limited number of distributors.[85]

These up-front access payments might also be a means of blocking smaller new entrants onto the market by increasing the barriers of entry or even to facilitate collusion between distributors (at para. 206). This level of collusion normally requires that the distribution market is already fairly concentrated.

The making of up-front access payment are block exempted when both the supplier's and the buyer's market share is less than 30 percent, it being understood that, below such market share figures, they are unlikely to result in the foreclosure of other distributors (even though it is arguable that, even below this market share figure, these types of payments are not necessarily efficient).

c. Category Management Agreements

The new *Guidelines* also include a new section regarding the analysis of so-called "category management" agreements. Category management agreements are those agreements in which the distributor entrusts the supplier with the marketing of a category of products, the supplier's products and those in the general category of products, including those of its competitors. At paras 205 – 208, the new *Guidelines* discuss the various possibilities of category management agreements resulting in anti-competitive foreclosure due to their tendency to facilitate collusion between suppliers, to distort competition between suppliers, and to facilitate collusion amongst distributors.[86]

However, the new *Guidelines* also acknowledge the possible efficiencies which might flow from the operation of category management agreements. According to para. 209 of the *Guidelines*, such agreements have the ability to allow both distributors and suppliers to achieve economies of scale. The distributors are able to guarantee that the quality products are presented in a timely manner and directly to the retailers, while the suppliers can tailor the marketing to specific customers, thereby increasing customer satisfaction.

To date, the French Competition Authority has conducted a Public Consultation on the effects on competition of Category Management Agreements. The results of its conclusions on 7 December 2010[87] amplified the more general concerns voiced by the Commission in the context of its Public Consultation procedure and in its *Guidelines.* Among the risks identified by the competition authority in relation to such practices, those especially highlighted were:

- the shelf space foreclosure risks for the competitors, due to the "category captain's" participation in the introduction, placement and positioning of products in stores;
- the provision to suppliers of exclusive information on sensitive qualitative and quantitative data, which would enable the category manager to anticipate the retailer's commercial strategy; and
- the risks of collusion between retailers, due to the possible horizontal arrangements that might arise between them.

In its assessment, the Authority underlined four points of recommendation, namely:

- The appointment of a category captain should, in principle, be made public (*i.e.* through a call for tender).
- Contracts/agreements should specify which tasks may be performed by the category manager and those which remain under the exclusive competence of the retail distributor.
- The category manager should only be provided with information that is indispensable to perform its tasks.
- The category manager should be precluded from making recommendations as regards the distributor's own brand.

IV. Unresolved Issues

While still in its relatively early stages of implementation across the EU Member States, the policy compromises reached in the forging of the new EU vertical restraints regime is beginning to generate a number of important enforcement issues across a broad range of the changes introduced in 2010. Many of these issues stem from the fact that the Commission, in imbuing the application of vertical restraints policy with a greater economic rationale (a laudable goal), is contemporaneously introducing a greater degree of legal uncertainty because of the departure from the "black letter law" approach initially pursued by earlier versions of the *Block Exemption Regulation.* This is especially the case given the fact that the major instrument of policy change is found in the Commission's *Guidelines*, which have nothing more than a persuasive force before national judges, as opposed to a Block Exemption Regulation, whose terms are directly applicable under the national legal systems of the EU Member States.

Given that the vast majority of the open issues under vertical restraints regime will need to be addressed at Member State level before national court judges (or, to a lesser extent, National Competition Authorities), it can be expected that the resolution of those issues will assume an increasingly important role antitrust practice across the EU. Some of those issues relate to the following:

The role of intellectual property: As noted in the discussion in Section III above, in its desire to differentiate between traditional vertical distribution relationships, on the one hand, and intellectual property licensing relationships, on the other, the Commission has made a number of strained distinctions in seeking to establish a "bright line" between the two regimes based solely on whether or not the intellectual property being licensed is deemed to be "ancillary" to the distribution agreement between the relevant parties. Consequently, the Commission has taken a somewhat artificial view of which franchising relationships fall within or outside the terms of *Block Exemption Regulation 330/2010*, given that intellectual

property licensing and know-how transfer lie at the heart of *all* franchise relationships.[88] Similarly, the rationale behind the Commission's conclusion that subcontracting agreements fall outside the *Block Exemption* because they involve the transfer of intellectual property rights (and hence go beyond those rights being merely ancillary to the distribution function) seems artificial. Consistent with the terms of its original *Notice on Subcontracting Agreements* and the treatment of the "single economic entity concept"[89] as the basis for why agency agreements fall outside the *Block Exemption* (see below), subcontracting agreements should fall outside the terms of *Block Exemption Regulation 330/2010* – and thereby also outside the scope of the prohibition in Article 101(1) TFEU – because a supplier and its subcontractor act as an integrated entity for the purposes of EU antitrust rules. An exclusion based on the ancillary nature of intellectual property licensing fails to draw the necessary link with the implications of the practice for the purposes of liability under Article 101(1) TFEU.

The scope of "potential" competition: The particular rules established to govern distribution relationships between competitors are open to significant debate, given that the concept of a competitor embraces both actual and *potential* competitors. Unlike the short timeframe (usually one year) attributable to the application of a Hypothetical Monopolist Test, the usual timeframe for determining the existence of a potential competitor is up to three (3) years. In a world where large supermarkets produce as many "home brands/own label" goods as they stock the branded goods of independent suppliers, it is difficult to make hard-and-fast decisions as to whether those supermarkets are not potential competitors (yet alone actual competitors if branded and own brand goods are considered to fall within the same relevant product market from a consumer's point of view). Similarly, if one takes the view that subcontractors do not form part of the same economic entity as the supplier, the scope for finding potential competition among an unrealistically broad set of market actors becomes self-evident.

Market shares: The introduction of a 30 percent market share threshold for distributors and retailers alike, in order to take into account that some large buyers might also enjoy market power, raises practical issues of self-assessment and compliance with *Block Exemption Regulation 330/2010*. National commercial judges in many Member States have a habit of interpreting such market thresholds rather inflexibly. In the recent past, the task of monitoring whether a supplier continued fall under a market share threshold was a complicated exercise in its own right. The need under the new regime to perform a parallel exercise to monitor whether the buyer also continues to fall under the threshold will not be a straightforward one.

Moreover, the sorts of information asymmetries which characterize many markets would suggest that a supplier would need to rely on some form of information exchange in order to be able to predict with any degree of certainty whether a buyer exceeded the 30 percent market share threshold. In an antitrust climate where enforcement actions against "hub and spoke" cartels are becoming more prevalent, and information sharing in the context of distribution relationships is the focal point of this new generation of cartel investigations, such a course of action seems prone to some residual risk.[90] In addition, given that market share calculations for large retailers may be based on a completely different geographic market scope (usually national, and often sub-national) than that which exists for suppliers, the process of market share calculation will be further

complicated as it will need to relate often to different "markets".

The net result might be that suppliers with strong brand names find it difficult to establish uniform distribution networks throughout the territory of the EU, as each relationship will need to be assessed under its national competitive conditions in which both the supplier and the distributor find themselves.[91]

Restrictions on online sales restrictions: It is inevitable the enforcement of the new rules on Internet sales will create interpretative problems, as they epitomize the spirit of "compromise" among the various stakeholders taking part in the Public Consultation on what is arguably the most divisive of issues (namely, the extent to which a supplier can insulate its "bricks-and-mortar" distributor against online sales). This can also be witnessed in the fact that the Commission has almost exclusively dedicated its attention to sales practices on the Internet to its "soft law" *Guidelines* rather than to its legally binding *Block Exemption Regulation 33/2010*.

As the rules currently stand, they prescribe narrow and fragmented guidance on what constitutes "active" or "passive" sales in an Internet context, which of itself will provide fertile ground for disputes. For example, one cannot escape the feeling that a number of the examples cited in the *Guidelines* to identify the dividing line between such types of sales are arbitrary (see, *e.g.*, para. 52 of the *Guidelines*), insofar as they proceed on the basis of a number of presumptions about the impact of linguistic and currency divisions which might not always hold true in practice. The specification in Internet advertising of different languages other than English and different currencies other than a Euro might very much be *specifically targeted* at customers outside a designated exclusive territory in certain circumstances, but be "general" advertising in others. There can be no blanket rule that can cover all permutations of "intent" in such an online context.

Given the pan-European territorial scope of the Internet, despite the fact that the vast bulk of disputes will be resolved at national level, one can expect that the Commission will take a particular interest in this area of the law in order to develop some workable precedents in the near future. In this respect, one can anticipate that the Commission will be particularly vigilant in relation to concentrated markets with respect to which price discounters (whether online or offline) might not have adequate access. As indicated earlier, two particular areas which are likely to remain problematic are restrictions imposed on distributors to retain at least part of their sales in the bricks-and mortar form – which has already been the subject of a very recent Judgment of the Court of Justice in the *Pierre Fabre Case*[92] – and their ability to charge different prices for the contract goods depending on whether sales are to occur online or through physical outlets.[93] The enforceability of both types of differentiated conduct turns on whether the contract products are capable of benefitting from the logic which underlies a selective distribution system, namely, that the maintenance of quality at the point of sale and with respect to after-sales service and advice is such as to justify such differentiation by reference to the level of investment required to maintain the quality levels in question.

Upon the referral to it of a series of questions by the *Cour d'Appel de Paris*, the Court of Justice in the *Pierre Fabre* case found that "*a contractual clause requiring sales of cosmetics and personal care products to be made in a physical space where a qualified pharmacist must be present, resulting in a ban on the use of the Internet for those sales, amounts to a*

restriction [of competition] by object". Of course, even a restriction of competition by object (clearly a hardcore restriction) could not benefit from the terms of a Block Exemption, it might in principle be capable of benefitting in its own individual circumstances from the exemption afforded by Article 101 TFEU where all the conditions of that provision could be satisfied. In providing guidance on how this process of evaluation can be applied, the Court proceeded to make a number of statements which will appear to be very difficult to reconcile in practice, if not necessarily in theory. *First*, the Court explained that a restriction of competition by object is something which needs to be considered in light of the specific content of the problematic clause, the objects it seeks to attain and its overall legal and economic context. *Second*, the Court repeated its traditional view that selective distribution systems "necessarily affect competition" in the market but that they are compatible with EU antitrust rules to the extent that the members of the selective network are chosen on the basis of objective criteria of a qualitative nature, and that the characteristics of the product necessitate the use of such a system in order to preserve its quality and to ensure its proper use. *Third*, the Court emphasized that it was for the national court to determine whether a contractual clause which *de facto* prohibits all forms of Internet selling can be justified by a "legitimate aim", but that the mere aim to preserve the prestigious image of a product is not a legitimate aim which could justify such a restriction of competition.

Rather disappointingly, the Court declined to take a view on the very thorny question of whether or not *Pierre Fabre* was able to ban Internet sales because such a ban would be no more restrictive than a prohibition on a selective distributor operating out of an authorized establishment, preferring to leave this matter to the national court to decide in its overall assessment of whether an individual exemption was justified. Given that Article 4(c) of *Block Exemption Regulation 330/2010* expressly excludes from the list of hardcore restraints any prohibition on a distributor to operate out of an unauthorized place of business,[94] it would have been extremely helpful for the Court to address this question, especially since it lay at the heart of *Pierre Fabre*'s defense. Even more disappointingly, the Court has made no effort to reconcile its approach with its own case-law dating back to 1996, where it was willing to permit a selective distributor to forbid sales by mail order on the basis that such sales would harm the "luxury" nature of the brand. That precedent had confirmed the Commission's own position to similar effect dating from 1992.[95] While the approach of the Commission in its *Guidelines* on the importance of preserving Internet sales is consistent with its more recent administrative practice,[96] it cannot be correct for the Court to avoid its own precedent without at least seeking to explain why and how the distance selling techniques of mail order and online sales are any different, or if the Court's view has had to change over time because of the characteristics of the Internet. No doubt, the French court has its work cut out to steer the proper course between two such polarized positions when it determines what constitutes a "legitimate aim" to prohibit Internet sales by reference to the quality of the product, given the much broader implications of its Judgment on the future shape of selective distribution systems across the EU.

Absolute territorial protection: In what constitutes a major exception to the rule that absolute territorial protection is forbidden under EU competition rules, especially given the historical importance attached to the freedom of a distributor to

make "passive" sales, the provision of a two-year exception to allow for absolute territorial exclusivity in those situations where the prohibition is necessary to justify the investment of a distributor to sell a new brand or sell an existing brand into a new market (the *Guidelines*, at para. 61)[97] constitutes a major step forward for vertical restraints policy in the EU.

Having said that, it would be an extreme optimist who would assume that concepts such as a "new market" and the "necessity" of the investments to penetrate such markets will not result in legal disputes before national courts. In the case of many types of consumer products, new generations of technology or fashion are being introduced, but it is doubtful if such products constitute "new" markets[98] in the antitrust sense, while at the same time many national judges will differ in their approach as to whether upgrades of traditional products characterized by stable distribution networks and loyal customer bases justify a "necessity" for absolute territorial protection. Indeed, if anything, many national judges seem to be reluctant to accept the necessity of exclusive distribution arrangements altogether where large market shares of the contract product are involved.[99]

Agency and the Internet: The extension some years ago of the *Block Exemption Regulation* to the distribution of "services" as well as the traditional distribution of "goods" has, to all intents and purposes, not been problematic in practice. However, the growth of Internet commerce has generated a number of new business models recently in relation to which various members of an online value chain find themselves in vertical relationships *vis a vis* one another. It is commonplace in such Internet-based environments that parties in different parts of the value chain fix remuneration and margins by reference to numbers of "hits", advertising expenditures, and other criteria, none of which sit comfortably with the traditional model of a distributor free to price independently and to assume all the relevant risks associated with the distribution of a particular product.

On the contrary, these relationships are much more accurately portrayed as either agency relationships taking place in a two-sided market context or as a joint venture relationships where risks are shared among the members of the joint venture. As such, from an antitrust point of view they should not be treated in the same manner as traditional vertical relationships, especially when considering pricing issues, particularly allegations of RPM. In the author's view, the usual RPM analysis has no role to play in such relationships but, at the very least, these are the sorts of situations which should benefit from a liberal view of what constitutes "efficiencies" in an online environment so as to justify what might otherwise appear to be restrictions on a distributor's freedom to set price.

Resale Price Maintenance (RPM): Despite the pronouncements of the Commission regarding the ability of parties to introduce arguments on "efficiencies" to justify their RPM practices under Article 101(3) TFEU, a review of the terms of legislation which exists at Member State level[100] and the existing case-law before National Competition Authorities and the courts[101] suggests that Member States are likely to adopt the traditional conservative approach to RPM that characterized the era where such clauses were "blacklisted" under the older Block Exemption regimes (*i.e.*, tantamount to a per se violation). As noted above, however, the advent of the Internet and the more complex value chains that are being driven by technological change raise some difficult issues of practical application in relation to RPM offences.

For example, on 10 May 2004, the Czech Competition Commission imposed a fine of CZK 6.5 million (US$264,850) on a mobile phone operator, Český Mobil a.s. for having fixed the prices which distributors could charge for "pre-paid coupons" for mobile-phones. In a case which involved an almost identical fact pattern, the UK's Office of Fair Trading had, on 5 April 2002, adopted a consumer protection oriented approach and characterized "pre-paid mobile vouchers" as being compatible with competition rules, since they were in accordance with Condition 58.3 of Vodafone's Telecommunications Act licence (which guaranteed end users that they would receive mobile airtime for the exact amount of the published price which they had paid). As can be seen from a comparison of the Czech and UK cases, the Czech Competition Authority took a less nuanced view than its UK counterpart in its assessment of RPM in a particular sectoral context, and found that obliging independent retailers to sell pre-paid cards at the advertised tariff constituted the illegal practice of RPM. In this regard, it is hoped that the UK precedent in the *Vodafone Decision* in 2002[102] might prove to be more instructive, insofar as the allegation that Vodafone had sought to impose RPM conditions on independent retailers in relation to its pre-paid cards was dismissed, given that the price of the pre-paid card represented Vodafone's publicized tariff rate which it provided pursuant to the terms of its mobile network operator license. In the relevant circumstances, it could not be said that an interference with the retail price amounted to RPM in a manner which would bring about consumer harm in the manner understood by antitrust rules.

Up-front Payments and Category Management Arrangements: Aside from the general foreclosure concerns raised by such practices where significant market shares are affected, the *Guidelines* provide an interesting additional insight into the fact that such practices might be capable of providing a focal point for a "hub and spoke" cartel (see discussion above). It would appear that such a scenario becomes increasingly problematic as industries tend towards greater concentration on both the supply side, but especially on the retail side of the market. The fact that the UK's existing precedents for hub-and-spoke cartels focus on the retail sector heightens the importance that should be attached to the horizontal antitrust risks raised by what ostensibly appears to be a uniquely vertical relationship between supply and distributor.

The antitrust risks inherent in managing Category Management relationships, for example, without falling foul of a hub-and-spoke style of allegation are illustrated by the approach taken recently by the French Competition Authority in its recent investigation into such practices (see above – Section III). In seeking to create a more "level playing field" among suppliers so as to minimize the foreclosure effects of Category Management agreements, measures have been proposed which add greater transparency to the relationships between suppliers and the Category Manager. However, in doing so, it is inevitable that competitors have greater transparency into one another's commercial practices, thereby arguably facilitating the tendency of competition regulators to see such ground as being fertile for a hub-and-spoke cartel scenario. It is a situation which therefore needs to be monitored closely by suppliers.

The use of the "counter-factual": Subjecting vertical restraints to a counterfactual analysis (see above; para 93 of the *Guidelines*) is a very important analytical step in developing a true European "rule of reason" which can somehow sit comfortably with the structure of Article 101 TFEU and

be sensitive to a more economics-based approach. One can only hope that it becomes an important tool for judges adjudicating competition cases. There is a very recent precedent at Member State level which applies the logic of the counterfactual to a situation involving RPM. On 24 February 2011, the Athens Appeals Court, in the case of *Fiat Hellas*, overturned the fine of 9.7 Million Euros imposed by the Greek Competition Authority[103] on the various members of the Fiat group operating in Greece for their involvement in an alleged RPM scheme with Fiat dealers over a number of years; in doing so, the Authority had rejected Fiat's defense that its dealers had simply been operating under the auspices of a "recommended price" scheme (which was perfectly compatible with EU antitrust rules). A highly material consideration in the Court's Judgment was the fact that the Greek Competition Authority, in concluding that the Fiat group had engaged in the practice of RPM with its dealers, had failed to subject the pricing data to an assessment under any other competitive scenario other than one consistent with the existence of RPM. However, given that Fiat operated a selective distribution system in Greece – which the European Courts have acknowledged has a tendency to generate price stability – the Competition Authority had erred in concluding that the stable prices witnessed on the market were the direct result of an RPM agreement in the absence of having subjected the facts to a through counterfactual analysis. It is to be hoped that the doctrine will be embraced more widely over time.

V. Conclusions

One year on from the adoption of the new vertical restraints regime, much remains unanswered as to the practical application of that new regime. Although it is true to say that the new regime which came into effect in 2010 is in many respects a logical continuum of its predecessor 1999 version, it is also the case that a number of threshold definitional issues add anything but legal certainty to the process of negotiating enforceable distribution arrangements across the EU.

Moreover, much of what has been introduced in the realm of Internet sales is largely untested in practice. It has also arguably opened up fresh areas of ambiguity and raised a number of contradictions in approach. This is probably the inevitable byproduct of the Commission modernizing its approach to vertical restraints (and especially RPM), while also seeking to promote distribution via the Internet while at the same time being mindful of the importance of Europe's prestige brands whose traditional distribution model is far removed from the world of online sales. Such policy compromises are difficult to forge, and the "collateral damage" is usually found in the area of legal certainty.

The very recent ruling of the European Court of Justice in the *Pierre Fabre* case has done little to inspire confidence that many of our open questions will be answered in the short term. If anything, it has posed a new layer of questions for practitioners. The logic of the EU system of decentralized enforcement by the Member States will probably mean that precedents will develop bit by bit, and we are by no means certain of a consistent and coherent approach being adopted across the range of vertical restraints that are likely to give rise to litigation. This is especially the case where the legal traditions of the Member States as regards matters such as parallel trade and the promotion of Internet commerce are not necessarily *ad idem* with the prevailing single market policy dynamic of the Commission.

In the circumstances, and particularly given the additional economic pressures wracking the EU, the Commission may be sorely tempted to bring an infringement action against certain problematic practices in order to inject greater legal certainty into the new verticals regime. The ride promises to be a bumpy one, but eventful.

NOTES

[1] See, *e.g.*, C-74/04 P *Commission v. Volkswagen AG*, [2006] ECR I-6585, at para. 36.

[2] *Commission Notice-Guidelines on Vertical Restraints*, OJ C 130, of 19.05.2010, p.1.

[3] *Commission Regulation 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices*, OJ LIO2, 23.4.2010, pp.1-7.

[4] *Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices*, OJ L 336, 29.12.1999, pp.21-25.

[5] The predecessor *Regulation 2790/1999* included in the same Block Exemption different types of distribution agreements (such as franchising, exclusive distribution, selective distribution, exclusive supply) which had been dealt with separately until at point in time. This consolidated approach has been maintained by the *Block Exemption Regulation 330/2010*.

[6] The benefits of the safe harbor regime may in theory be removed at some point in the future from an individual party where market access is shown to be significantly restricted by the cumulative effects of parallel networks exhibiting similar vertical restraints (see paras. 74-78 of the *Guidelines*), or from all competitors where such parallel networks of vertical restraints account for more than ... of a relevant market (Article 6).

[7] A "Block" Exemption regulation specifies those "safe harbor" situations from the restriction on competition prohibition set forth in Article 101(1) TFEU (*ex* Article 81(1) EC), where certain distribution practices are deemed to be compatible with competition rules if certain conditions have been satisfied. *Guidelines* are examples of EU "soft law" instruments which summarize the Commission's enforcement policies and outline the legal standards established by the European Courts.

[8] Article 101(2) TFEU provides that restrictions of competition are automatically void, and hence unenforceable, where they infringe the restriction of competition prohibition contained in Article 101(1), unless the provision or agreement in question can benefit from an exemption because it satisfies the pro-competitive conditions set forth in Article 101(3) (*i.e.*, contributes to improving the production or distribution of goods or to promote technical progress, allows consumers a fair share of the resulting benefits, does not impose restrictions which are not indispensible to the attainment of such objectives, and does not afford the possibility of eliminating competition in respect of a substantial part of the products concerned). Since the adoption of *Regulation 1/2003*, the assessment made under Article 101(3) TFEU needs to be made by the parties themselves, rather than requiring the Commission to take a view as to the enforceability of the relevant provisions of an agreement pursuant to a notification procedure.

[9] This is the inevitable by-product of any regime that moves from a more prescriptive approach to one which is based more on the appraisal of the enforceability of an agreement in light of the overall evaluation of competition in the affected market.

[10] Case C-439/09 *Pierre Fabre Dermo-Cosmétique v. Président de l'Autorité de la Concurrence & Ors.*, Judgment of 13 October 2011 (NYR).

[11] 220 U.S. 373 (1911).

[12] 250 U.S. 300 (1919).

[13] See *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 380 (1967); *Continental*

T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 58-59 (1977).

[14] See discussion in P. Alexiadis and P. Sullivan, *Vertical restraints: new directions in EU policy*, The European Antitrust Review 2004, pp. 68-71.

[15] *Leegin*, 551 U.S. at 881-82.

[16] *Id.* at 890-91.

[17] *Id.* at 898.

[18] Alan M. Barr, *Antitrust Federalism in Action—State Challenges to Vertical Price Fixing In the Post*-Leegin *World*, The Antitrust Source, (Dec. 2009) ("Despite the demands of *Leegin*, Attorneys General will not end their pursuit of RPM cases because of a central truth—RPM means higher prices to consumers.").

[19] See S.2261 (introduced Oct. 30, 2007), bill tracking available at http://www.govtrack.us/congress/bill.xpd?bill=s110-2261; S.148 (introduced Jan. 6, 2009), bill tracking available at http://www.govtrack.us/congress/bill.xpd?bill=s111-148; H.R. 3190 (introduced Jul. 13, 2009), bill tracking available at http://www.govtrack.us/congress/bill.xpd?bill=h111-3190.

[20] Bye Bye Bargains? Retail Price Fixing, the Leegin Decision, and Its Impact on Consumer Prices: Hearing Before the Subcomm. On Courts and Competition Policy of the Comm. on the Judiciary, 111th Cong. (2009), available at http://judiciary.house.gov/hearings/hear_090428_1.html.

[21] Letter from National Association of Attorneys General Letter to Sen. Herb Kohl and Sen. Orrin G. Hatch (Oct. 27, 2009), available at http://www.naag.org/assets/files/pdf/signons/20091027.S_148.pdf; Letter from National Association of Attorneys General Letter to Rep. John Conyers and Rep. Lamar Smith (Oct. 27, 2009), available at http://www.naag.org/assets/files/pdf/signons/20091027.HR_3190.pdf. The two letters are identical.

[22] Letter from ABA to Rep. Henry C. Johnson and Rep. Howard Coble (May 5, 2009), available at http://new.abanet.org/antitrust/Searchable%20Antitrust%20Library/comments_2009may6_leegincaseh_l.pdf.

[23] See S.75 (introduced January 25, 2011), bill tracking available at http://www.govtrack.us/congress/bill.xpd?bill=s112-75.

[24] *See PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, No. 2:03-CV-107, 2009 U.S. Dist. LEXIS 28505 (E.D. Tex. Apr. 6, 2009).

[25] *PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, 615 F.3d 412, 416 (2010).

[26] *Id.*

[27] *Id.*

[28] *Id.* at 419, 421.

[29] These States include Colorado, Delaware, Florida, Idaho, Massachusetts, Michigan, Missouri, Nebraska, New Mexico, Oklahoma, Oregon, Rhode Island, Texas, Virginia, and Washington.

[30] These States include Alaska, Kentucky, Louisiana, South Dakota, Utah, and Wisconsin. The District of Columbia also employs a similar statute.

[31] Maryland Commercial Code § 11-204.

[32] *Id.*

[33] Cal. Bus. & Prof. Code § 16720(d).

[34] Cal. Bus. & Prof. Code § 16720(e).

[35] Kansas law prohibits "*all arrangements, contracts, agreements, trusts or combinations between persons*" which tend to "*advance, reduce or control the price or the cost to the producer or to the consumer of any such products or articles*." Kan. Stat. Ann. § 50-112. Montana law prohibits agreements "*not to manufacture, sell, or transport an article of commerce below a common standard or figure*." Mont. Code Ann. § 30-14-205(h). New York's statute states that "*[a]ny contract provision that purports to restrain a vendee of a commodity from reselling such commodity at less than the price stipulated by the vendor or producer shall not be enforceable or actionable at law*." N.Y. Gen. Bus.

Law § 369-a. New Jersey law provides "[*a*]*ny contract provision that purports to restrain a vendee of a commodity from reselling such commodity at less than the price stipulated by the vendor or producer shall not be enforceable or actionable at law*." N.J. Stat. Ann. § 56:4-1.1. Ohio law prohibits agreements "*not to sell, dispose of, or transport an article or commodity, or an article of trade, use, merchandise, commerce, or consumption below a common standard figure or fixed value*." Ohio Rev. Code Ann. § 1331.01(B)(5).

[36] These States include Arizona, Arkansas, Connecticut, Hawaii, Indiana, Massachusetts, Mississippi, Nevada, New Hampshire, Rhode Island, South Carolina, Tennessee, Texas, and West Virginia. For a more detailed discussion of the price fixing laws in various States, see Michael Lindsay, *Resale Price Maintenance and the World After Leegin*, 21 Antitrust 32, 37-40 (2007).

[37] Complaint at ¶ 20, *New York v. Herman Miller, Inc.*, No. 08-cv-2977 (S.D.N.Y. Mar. 25, 2008).

[38] Stipulated Final Judgment and Consent Decree at 7, *New York v. Herman Miller, Inc.*, No. 08-cv-2977 (S.D.N.Y. Mar. 25, 2008).

[39] Complaint, *New York v. Herman Miller, Inc.*, No. 08-cv-2977 (S.D.N.Y. Mar. 25, 2008).

[40] No. 400837/10, 2011 WL 198019, at *2 (N.Y. Sup. Ct. Jan. 14, 2011).

[41] *Id.* at *8.

[42] *See* Complaint at ¶¶ 10-12, *People v. DermaQuest, Inc.*, No. RG-10497526 (Cal. Super. Ct. Feb. 23, 2010), available at http://app3.naag.org/antitrust/docs/588.civil.CA%20v%20Dermaquest%20Complaint.pdf; *People v. DermaQuest, Inc.*, No. RG-10497526, at *5 (Cal. Super. Ct. Feb. 23, 2010), available at http://app3.naag.org/antitrust/docs/588.civil.CA%20v%20DermaQuest%20Judgment.pdf.

[43] *People v. Bioelements, Inc.*, No. INC-10011659 (Cal. Super. Ct. Jan. 11, 2011); Complaint at ¶ 10, *People v. Bioelements, Inc.*, No. INC-10011659 (Cal. Super. Ct. Jan. 11, 2011).

[44] In this regard, see also A. I. Gavil, *Resale Price Maintenance in a Post-Leegin World: A Comparative Look at Recent Developments in the United States and European Union*, The CPI Antitrust Journal, June 2010 (1).

[45] The EU expression "undertaking" is used to cover all forms of corporate configuration, and even an individual person. For ease of reference, however, this article will refer to the more familiar concept of a "party".

[46] Refer to Article 1(1)(a) of *Regulation 330/2010*. Refer also to Article 2(2) as regards agreements between associations of retailers and their members, where no individual retailer exceeds 50 Million Euros in annual turnover.

[47] See paragraph 25(a) of the *Guidelines*.

[48] *Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community*, OJ C 368 of 22.12.2001.

[49] In other words, non-reciprocal distribution arrangements can fall within the scope of *Block Exemption Regulation 330/2010* in one of two clear-cut situations, namely: (i) where the supplier of goods is both a manufacturer and a distributor of those goods, whereas the buyer in question provides a distribution function but does not compete at the level of manufacture; and (ii) the supplier of goods is active at a number of functional levels of trade, whereas the buyer is active only at the retail level and does not compete at the functional level of purchase of the services in question.

[50] For example, refer to the very good discussion on this issue in R. Subiotto and C. Dautricourt, in "*The Reform of European Distribution Law*", World Competition, Vol. 34, No.1 (2011), pp. 11-50, at pp. 18-23.

[51] Refer to the discussion on the "bottling problem" in the *Guidelines*, especially at paras. 33 and 36.

[52] Discussed by Subiotto and Dautricourt, *op. cit.*, at pp. 20-21.

[53] According to Article 7(e), where a market share does not exceed 30 percent initially at the time of contract but subsequently rises to above 35 percent, the exemption continues to apply for one calendar year after the 35 percent figure has been reached.

[54] G. De Stefano, *The new EU 'Vertical Restraints Regulation': navigating the vast sea beyond safe harbours and hardcore restrictions*, (2011) 31 (12) E.C.L.R 487.

[55] I. Lianos, *New Kids on the Block: Retailer-driven Vertical Practices and the New Regulation of Vertical Restraints in EU Competition Law*, The Competition Policy International Antitrust Journal (2010) (2), at pp.5-6.

[56] But see P. Lugard and T. van Dijk, "*The New Block Exemption for Vertical Restraints: A Step Forward and a Missed Opportunity*", CPI Antitrust Law Journal, June 2010 (2), who express the view that any serious investigation of consumer harm needs to take into account the prevailing downstream market structure.

[57] An agent, for the purpose of selling or purchasing goods, is defined in the *Guidelines* (at para. 12) as a "*legal or physical person vested with the power to negotiate and/or conclude contracts on behalf of another person (the principal), either in the agent's own name or in the name of the principal*".

[58] This "single economic entity" test constitutes an EU-specific application of the principle established in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S 752, 777 (1984). See Joined Cases 40/73-48/73, 54/73-56/73, 111/73, 113-114/73 *Suiker Unie & Other v. Commission* [1975] ECR 1663, para. 480.

[59] For example, see Case C-217/05 *Confederación Española de Empresarios de Estaciones de Servicio v. Compañía Española de Petróleos SA* [2006] ECR I-11987; Case 48/69 *ICI v. Commission* [1972] ECR 619, at para. 140; Case C-266/93 *Volkswagen and VAG Leasing* [1995] ECR I-3477.

[60] See Case COMP/36.264 *Mercedes-Benz*, OJ 2002 L257, p.1; at para. 155ff.

[61] See discussion in the *Guidelines*, especially at paras. 13-17.

[62] M. Brenning-Louko, A Gurin, L Peeperkorn and K Viertiö, "*Vertical Agreements: New Competition Rules for the Next Decade*", (2010) (2) The Competition Policy International Antitrust Journal, p.4.

[63] *Ibid*, p.488.

[64] Reflecting the position in its predecessor Block Exemption, the hardcore restriction does not extend to maximum price restrictions, nor to "recommended" prices. As to those situations where such practices might be considered tantamount to a minimum or fixed price, refer to discussion in the *Guidelines* at paras 223-229. (*cf.* para. 48).

[65] Refer to discussion at para. 225 of the *Guidelines*.

[66] P. Lugard and T. van Dijk, *The New EC Block Exemption for Vertical Restraints: A Step Forward and a Missed Opporunity*, (2010) (2) *The Competition Policy International Antitrust Journal*, p.7.

[67] Although refer to the examples set forth in para. 51 of the *Guidelines* for situations where particular online sales advertising and promotional activities could constitute "active" selling.

[68] See discussion at paras 49-51 of the *Guidelines*.

[69] P. Marsden & P. Whelan, "*Selective Distribution in the Age of Online Retail*", (2010) 1 *E.C.L.R.* 26.

[70] As to the nature of a selective distribution network and the treatment under EU antitrust rules of such methods of distribution, refer to V. Korah and D. O'Sullivan, "*Distribution Agreements Under the EC*

Competition Rules", Hart Publishing, Oxford 2002.

[71] *Ibid*, p.36.

[72] F. Dethmers and P. Posthuma de Boer, "*Ten Years On: Vertical Agreements Under Article 81*", (2009) 9 *E.C.L.R.* 424, 434.

[73] Accordingly, as was recognized by the European Court of Justice in *AEG Telefunken v. Commission*: "*... it has always been recognized in the case law of the Court that there are legitimate requirements, such as the maintenance of a specialist trade capable of providing specific services as regards high-quality and high technology products, which may justify a reduction of price competition in favor of competition relating to factors other than price. Systems of selective distribution, in so far as they aim at the attainment of a legitimate goal capable of improving competition in relation to factors other than price, therefore constitute an element of competition which is in conformity with Article [81(1)]...*". Case 107/82, *Allgemeine Elektricitäts-Gesellschaft AEG-Telefunken AG v. Commission* [1983] ECR 3151, as from paragraph 33; cf. Case 75/84, *Metro II* [1986] ECR 3021.
Clearly, therefore, any selective distribution system will have a tendency to not be dynamic in terms of price competition, essentially because the dealers within the selective distribution framework are giving priority to the promotion of their goods through criteria other than merely price. In such an environment, having recommended prices is totally consistent with the philosophy behind establishing a selective distribution network.

[74] See *Saba*, OJ 1976 L 28/19, at para 34.

[75] Selective distribution is defined in Article 1(e) of *Block Exemption Regulation 330/2010* as the situation where a supplier undertakes to sell the contract products only to distributors selected on the basis of specified criteria and these distributors undertake not to sell the contract products to unauthorized distributors. Interestingly, this definition of selective distribution is much wider than that used in the case-law for selective, where the European courts have insisted that the benefits of selective distribution inure only to those products which require the establishment of qualitative criteria for entry, based upon the nature of the products (highly technical or prestige brands) and the level of direct and after-sales service which those products attract. See, for example, Case 27/76, *Metro v. Commission* [1977] ECR 1875. The use of a lesser standard can be reconciled with the Metro precedent because the Court established that restrictions on cross-supply between such members of a selective distribution system did not infringe Article 101(1) TFEU, yet alone require a "safe harbor".

[76] See *Guidelines*, at para. 55.

[77] See discussion in *Guidelines*, at paras 189-191.

[78] See *Guidelines*, at para. 56.

[79] See earlier discussion on the four conditions set forth in Article 101(3) TFEU.

[80] Article 5(a) of *Block Exemption Regulation 330/2010*. Note that an obligation to purchase more than 80 percent of a buyer's needs will be considered tantamount to a non-compete obligation.

[81] A tacit renewal beyond this period will be considered to constitute an indirect obligation which exceeds five years.

[82] Refer to Article 5(c) of *Block Exemption Regulation 330/2010*. Although *contra* the Commission precedent *Parfums Givenchy*, OJ 1992, L 236/11, at p.13, where the Commission was willing to accept a restriction that only particular brands of competing manufacturers be sold by the selective distributor.

[83] Article 5(b) of *Block Exemption Regulation 330/2010*.

[84] Query whether such an approach is possible in a distribution context under the safe harbor regime where it is deemed that the licensing of intellectual

property is not an ancillary aspect of the distribution agreement (see discussion earlier).

[85] In other words, these arrangements should be assessed in a manner similar to exclusive supply obligations (*Guidelines* at para. 176).

[86] As rated by the Commission at para. 210 of the Guidelines, the assessment of any negative effects on competition will be made on the basis of factors such as the geographic scope of the agreement, the strength of competition supplies and the possibility that these exist ... effects from the widespread existence of such agreements.

[87] See Press Release (in English) available at http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=368&id_article=1511.

[88] See, for example, the approach taken towards industrial franchise relationships in para. 34 of the *Guidelines*, as compared to other forms of franchising.

[89] Refer to OJ 1979 C 1/2. Refer to *Guidelines*, especially at para 21.

[90] As pioneered in the UK in cases such as: *OFT Dairy Products* (Decision of 10 August 2011: CE :3094-03); *Argos Ltd. & Anor v. Office of Fair Trading* [2006] EWCA Civ 1318; and *Replica kit and Hasbro toys cases*, namely, Case CP/0871/01 *Price-fixing of Replica Football Kit* [1 August 2003] and Case CP/0480-01 *Agreements between Hasbro UK Ltd, Argos Ltd and Littlewoods Litd Fixing the price of Hasbro Toys and Games* [21 November 2003]; as also identified in the vertical distribution context in the discussion in the *Guidelines* of up-front payments systems and Category Management agreements (see above). Refer more generally to O. Odudu, "*Indirect Information Exchange: The Constituent Elements of Hub and Spoke Collusion*", European Competition Journal, August 2011, p.205.

[91] In this regard, see also K. Fountoukakos and K. Geeurickx, "*The New vertical Block Exemption Regulation and Guidelines – Practical Implications*", CPI Antitrust Journal 2 (June 2010); refer also to Subiotto and Dautricourt, *op. cit.*, at p. 16.

[92] *Op. cit.*

[93] The Dutch courts have already had the opportunity to review differentiated pricing schemes based on offline/online distribution methods. See the discussion of *Groen Trend & Keukens/AEP Home Products*, by A. Stoffer in E-Competition, No. 427 of 30 December 2005.

[94] Although it is just as clear that a dealer in a slective distribution system cannot be prohibited from advertising on the Internet (see para 56 of the *Guidelines*).

[95] See Case T-19/92, *Leclerc v. Commission* [1996] ECR II-1851, at para. 120; *cf. Yves Saint Laurent Parfums*, OJ 1992 L & 2:24, at p. 30.

[96] See Commission Press Release IP/00/1418 of 6 December 2000 (re B&W investigation).

[97] See M. Brenning-Luoko, A. Gurin, *et al.*, *op. cit.*, at p.19.

[98] A new generation of technology often subsumes the older generation of technology into an integrated market definition. See, for example, *BSkyB/BT/Matsushita*, OJ L 312 of 6.12.1999, pp. 1-37.

[99] For example, on 9 September 2010, the Norwegian Civil Court of Appeal held that "Tine" was considered to have infringed the Norwegian Competition Act, due to the Company's negotiations of exclusivity agreements with Rema 1000. Those agreements created a significant risk for the foreclosure of Tine's sole competitor, Synnøve Finden. On 14 July 2009, the German Competition Authority, ("Bundeskartelamt"), prohibited the exclusivity agreements that were concluded between Merck KG a ("Merck"), the leading producer of laboratory chemicals in Germany, and VWR, the leading company in the trade of laboratory chemicals worldwide, and ordered the former

either to supply chemical products to other distributors or directly to end customers.

[100] For example, for *France*, see Article L. 420-1 of the French *Commercial Code*; and Article L. 442-5 of the *Commercial Code*. For *Germany*, see the German *Act Against Restraints of Competition*. For *Italy*, see Section 2 of the Italian *Antitrust Law* (Law n. 287 of 1990). For *Poland*, see Article 5 of the Polish *Act on Competition and Consumer Protection* of 15 December 2000. For *Spain*, see the Spanish *Law for the Defense of Competition*. For the *United Kingdom*, see The UK's 1998 *Competition Act*. For *Switzerland*, see Article 5(1) of the Swiss *Act on Cartels*; Notice on the Competition Law Treatment of Vertical Agreements ("*Notice on Vertical Agreements")*, 2002 issued by the Swiss Competition Commission; and a *draft Revised Notice on Vertical Agreements* in September 2006.

[101] See, for example, *Ciba Vision*, WuW/F DE-V 1813 – Kontaklinsen, Decision of 25 September 2009, B3-123/08 (Germany); *Tikkurila. SA., Castorama Polska Sp. zo., Praktiker Polska Sp. zo.*, E-Competition, No. 32130 (Office for Competition and Consumer Protection, Poland); *SC Interfruct SRL, SC Albinuţa Shops SRL, SC Profi Rom Food SRL*, e-Competition, No 37135 (Romanian Competition Authority); Prohibition decision concerning RPM practices in public tenders for hospital equipment, E-Competition, No 35733 (Portuguese Competition Authority); Decision 4/0-02-14/11-12, *Grand Prom a.d., Idea d.o.o.*, E-Competition, No. 37003 (Serbian Competition Authority); See also the case of *Burda/Pressegroβvertrieb*, E-Competition, No. 31016 (Austria).

[102] OFT, CA98 Decision: *The Federation of Wholesale Distributors and Vodafone*, April 2002.

[103] The appeal from the Decision of the Hellenic Competition Commission, Decision No. 437/V/2009, *Fiat Auto SPA/Fiat Auto Hellas SA/Fiat GroupAutomobiles SPA/Fiat Credit Hellas SPA.*

ANNEX

DIFFERENCES BETWEEN THE 2000 AND 2010 EUROPEAN UNION VERTICALS REGIMES

RELEVANT SECTION	2000 VERTICALS REGIME (ARTICLE 81 EC)	2010 VERTICALS REGIME (ARTICLE 101TFEU)
Vertical Agreements Which Generally Fall Outside the Restrictive Agreements Prohibition		
Agreements of minor importance and SMEs	Vertical agreements between undertakings whose relevant market share is less than *10 percent* are *generally considered* to fall outside the scope of the Article. It is nevertheless specified that the prohibition may apply below the *10 percent* threshold, if there is an appreciable effect on trade between Members States and on competition.	Changes percentage of market share to fall outside Article 101(1)TFEU to *15 percent*. Changes percentage of market share to *15 percent*.
Agency agreements	Lists *two* types of financial or commercial risk that are material to the assessment of the genuine nature of an agency agreement under Article 81(1) EC, namely: • Risks directly related to the contracts concluded and/or negotiated by the agent for the principal, such as financing of stocks; and • Risks related to market-specific investments.	Adds a third type of financial or commercial risk material to the definition of an agency agreement for application of Article 101(1): • Risks related to other activities undertaken on the same product market, to the extent that the principal requires the agent to undertake such activities, but not as an agent on behalf of the principal but for its own risk. Adds more specific guidance on how to determine whether an agency relationship exists. Advises that the analysis should commence with contract-specific risks, then risks related to market-specific investments, then risks related to other required activities within that same product market.
Application of the Block Exemption Regulation		
General Prerequisites	Article 2(4) of the Block Exemption stated that the exemption shall apply where competing undertakings enter into a non-reciprocal vertical agreements and:	Deletes the original subsection (a), allowing exemption where the buyer has a total annual turnover exceeding EUR 100 million.

RELEVANT SECTION	2000 VERTICALS REGIME (ARTICLE 81 EC)	2010 VERTICALS REGIME (ARTICLE 101TFEU)
	(a) the buyer has a total annual turnover not exceeding EUR 100 million, or (b) the supplier is a manufacturer and a distributor of goods, while the buyer is a distributor not manufacturing goods competing with the contract goods, or (c) the supplier is a provider of services at several levels of trade, while the buyer *does not provide competing services* at the level of trade where it purchases the contract services.	Slightly changes the language of subsection (c), now subsection (b), to specifically refer to goods or services at the *retail level*.
"Safe harbour" created by the Block Exemption Regulation	Article 3(1) stated that exemption applies where the supplier's market share does not exceed 30 percent. Article 3(2) stated that, for exclusive supply obligations, the exemption shall apply on condition that the market share held by the buyer does not exceed 30 percent of the relevant market on which it purchases the contract goods or services.	Changes to text to state that, in order for the exemption to apply, the supplier's *and* the buyer's market share must each be 30 percent or less. Adds that there is no presumption that agreements with a supplier or buyer with above 30 percent market share either fail or satisfy Article 101(3)TFEU.
Scope of the Block Exemption Regulation		
"Hardcore" restrictions under the Block Exemption Regulation	Describes the list of hardcore restrictions which lead to the exclusion of the vertical agreement in its entirety from the scope the Block Exemption Regulation. Individual exemption of vertical agreements containing such hardcore restrictions is unlikely. Definition of 'active' sales- "Active sales" means actively approaching individual customers inside another distributor's exclusive territory or exclusive customer group by, for example: direct mailings or visits; or actively approaching a specific customer group or customers in a specific territory allocated exclusively to another distributor through advertisements in media, or other promotions specifically targeted at	Presumption- Adds a presumption stating that where there is a hardcore restriction in an agreement, that agreement falls within Article 101(1)TFEU. Furthermore, that agreement is unlikely to fulfill the conditions of Article 101(3)TFEU. The relevant criteria listed in Article 101(3)TFEU can, however, be fulfilled in individual cases. Definition of 'active' sales- Adds that the *sending of unsolicited e-mails* and actively approaching a specific customer group or customers in a specific territory *through advertisement on the Internet* constitutes forms of active sales. Adds explanation that advertisements or promotions that are only attractive to the buyer if they (also) reach a specific group of customers or customers in a specific territory, are considered to

RELEVANT SECTION	2000 VERTICALS REGIME (ARTICLE 81 EC)	2010 VERTICALS REGIME (ARTICLE 101TFEU)
	that customer group or targeted at customers in that territory; or establishing a warehouse or distribution outlet in another distributor's exclusive territory.	constitute examples of active selling to that customer group or customers in that territory.
	Definition of 'passive' sales- "Passive sales" are those responding to unsolicited requests from individual customers, including the delivery of goods or services to such customers. General advertising or promotion in the media *or on the Internet* that reaches customers in other distributors' exclusive territories or customer groups but which is a reasonable way to reach customers outside those territories or customer groups, for instance to reach customers in non-exclusive territories or in one's own territory, are passive sales.	Definition of 'passive sales'- Deletes reference to the Internet. Adds that general advertising or promotional measures are considered to be a reasonable way to reach customers if they would be attractive for the buyer to undertake these investments where they would not reach customers in other distributors' (exclusive) territories or customer groups.
	Internet sales- States that every distributor must be free to use the Internet to advertise or sell products. States that, in general, the *use of the Internet* is not considered to be a form of active sales into such territories or customer groups, since it is a reasonable way to reach every customer.	Internet sales- States that, *in principle*, every distributor must be allowed to use the Internet to sell products. States that in general, *having a website* is considered to be a form of passive selling, since it is a reasonable way to allow customers to reach the distributor. Adds that if a customer opts to be kept (automatically) informed by the distributor and this leads to a sale, this constitutes a passive sale.
	The language used on the website or in the communication plays normally no role in respect of whether a sale through the website would be considered to be a passive sale.	A reference to language options is done while stating that "*Offering different language options on the website does not, of itself, change the passive character of such selling*." Lists a series of hardcore restrictions to the passive selling obligation, which includes agreements to: • Prevent customers located in another exclusive territory viewing an exclusive distributor's website, *e.g.*, through rerouting. This does not exclude agreeing that the distributor's website is to offer a number of links to websites of other distributors and/or the supplier.

Relevant Section	2000 Verticals Regime (Article 81 EC)	2010 Verticals Regime (Article 101TFEU)
		• Terminate a consumer's transactions over the Internet once its credit card data reveals an address that is not within the distributor's (exclusive) territory. • Limit a distributor's proportion of overall sales made over the Internet. This does not exclude the supplier requiring, without limiting the online sales of the distributor, that the buyer sells at least a certain absolute amount (in value or volume) of the products offline to ensure an efficient operation of its "bricks and mortar" shop (physical point of sales), nor does it preclude the supplier from making sure that the online activity of the distributor remains consistent with the supplier's distribution model (see paras. (54) and (56)). This absolute amount of required offline sales can be the same for all buyers, or can be determined individually for each buyer on the basis of objective criteria, such as the buyer's size in the network or its geographic location; • oblige the distributor to pay a higher price for products intended to be resold by the distributor online than for products intended to be resold offline. This does not exclude the supplier agreeing with the buyer a fixed fee to support the latter's offline or online sales efforts.
	Active Internet sales- Websites specifically targeted at customers primarily inside the territory or customer group exclusively allocated to another distributor, for instance, with the use of banners or links in pages of providers specifically available to these exclusively	Active Internet sales- Online advertisement specifically addressed to certain customers is a form of active selling. For instance, territory based banners on third party websites are a form of active sales into the territories where these banners are shown.

RELEVANT SECTION	2000 VERTICALS REGIME (ARTICLE 81 EC)	2010 VERTICALS REGIME (ARTICLE 101TFEU)
	allocated customers, are considered to be "active" sales. Unsolicited e-mails sent to individual customers or specific customer groups are considered to constitute active selling.	In general, efforts to be made specifically with respect to a certain territory or in relation to a certain customer group constitutes active selling. For instance, paying a search engine or online advertisement provider to have advertisements displayed specifically to users in a particular territory amounts to active selling into that territory.
	Quality standards- The supplier may require quality standards for the use of the Internet site to resell his goods, just as the supplier may require quality standards for a shop or for advertising and promotion in general. The latter may be relevant, in particular, for selective distribution systems. *"An outright ban on Internet or catalogue selling is possible only if there is an objective justification for the restriction. In any case, the supplier cannot reserve to itself sales and/or advertising over the Internet."*	Quality standards- Adds the condition "*for selling by catalogue*" as another example of an acceptable quality standard set by the supplier. Adds that the supplier may require that its distributors have one or more brick and mortar shops or showrooms as a condition for becoming a member of its distribution system. Subsequent changes to such a condition are also possible under the Block Exemption, except where those changes have as their object to directly or indirectly limit the online sales by the distributors. Adds that a supplier may require that its distributors use third party platforms to distribute the contract products only in accordance with the standards and conditions agreed between the supplier and its distributors for the distributors' use of the Internet.
	Exceptions to the hardcore restriction in Article 4(b) (restriction on territory a buyer to the agreement may sell the contract goods or services)- It is permissible to: • restrict a wholesaler from selling to end users; • restrict an appointed distributor in a selective distribution system from selling, at any level of trade, to unauthorized distributors in markets where such a system operated; and • restrict a buyer of components supplied for incorporation from reselling them to competitors of the supplier.	Exceptions to the hardcore restriction in Article 4(b) (restriction on territory a buyer to the agreement may sell the contract goods or services)- It is permissible to: • restrict a wholesaler from selling to end users, *which allows a supplier to keep the wholesale and retail level of trade separate* (*this exception also covers allowing the wholesaler to sell to certain end users, for instance bigger end users, while not allowing sales to (all) other end users*); • restrict an appointed distributor in a selective distribution system from selling, at *any* level of

Relevant Section	2000 Verticals Regime (Article 81 EC)	2010 Verticals Regime (Article 101TFEU)
		trade, to unauthorized distributors in markets where such a system operated *or where the supplier does not yet sell the contract products*; and • restrict a buyer of components supplied for incorporation from reselling them to competitors of the supplier.
	Exceptions to the hardcore restriction in Article 4(c) (restriction on active or passive sales to end users by members of a selective distribution system)- The hardcore restriction set out in Article 4(c) concerns the active or passive sales to end users, whether professional end users or final consumers, by members of a selective distribution network. This means that dealers operating in a selective distribution system cannot be restricted in terms of the users or purchasing agents acting on behalf of these users to whom they may sell. For example, the dealer should also be free to advertise and sell with the help of the Internet. A selective distribution network may be combined with exclusive distribution appointments, provided that active and passive selling is not restricted anywhere across the range of distributors. The supplier may therefore commit itself to supplying only to one dealer or a limited number of dealers in a given territory.	Exceptions to the hardcore restriction in Article 4(c) (restriction on active or passive sales to end users by members of a selective distribution system)- Adds phrase "*without prejudice to the possibility of prohibiting a member of the network from operating out of an unauthorised place of establishment*" to end of sentence. Adds phrase that dealers cannot be restricted in the choice of users to whom they may sell, or purchasing agents acting on behalf of those users "*except to protect an exclusive distribution system operated elsewhere.*" Adds a hardcore restriction on "*any obligations which dissuade appointed dealers from using the Internet to reach a greater number and variety of customers by imposing criteria for online sales which are not overall equivalent to the criteria imposed for the sales from the brick and mortar shop.*" It is furthermore stated that "[t]his does not mean that the criteria imposed for online sales must be identical to those imposed for offline sales, but rather that they should pursue the same objectives and achieve comparable results and that the difference between the criteria must be justified by the different nature of these two distribution modes." The new text provides an example and nuances of this type of hardcore restriction.

RELEVANT SECTION	2000 VERTICALS REGIME (ARTICLE 81 EC)	2010 VERTICALS REGIME (ARTICLE 101TFEU)
	Selective Distribution- Restrictions can be imposed on the dealer's ability to determine the location of his business premises. Selected dealers may be prevented from running their business from different premises or from opening a new outlet in a different location. If the dealer's outlet is mobile ('shop on wheels'), an area may be identified outside which the mobile outlet cannot be operated.	Selective Distribution- Adds that a selective distribution system may not be combined with exclusive distribution appointees as that would lead to a hardcore restriction of active or passive selling by the dealers under Article 4(c), with the exception that restrictions can be imposed on the dealer's ability to determine the location of its business premises. Adds a new provision that the use by a distributor of its own website cannot be considered to be the same thing as the opening of a new outlet in a different location. Adds a new provision that the supplier may commit itself to supplying only one dealer or a limited number of dealers in a particular part of the territory where the selective distribution system is applied. Exceptions to the hardcore restriction in Article 4(d) (restriction of cross-supplies between distributors)- This new paragraph addresses the restriction of cross-supplies and selective distribution. States that selected distributors must remain free to purchase the contract products from other appointed distributors within the network, operating either at the same or at a different level of trade. Consequently, selective distribution cannot be combined with vertical restraints aimed at forcing distributors to purchase the contract products exclusively from a given source. It also means that, within a selective distribution network, no restrictions can be imposed on appointed wholesalers as regards their sales of the product to appointed retailers.

Relevant Section	2000 Verticals Regime (Article 81 EC)	2010 Verticals Regime (Article 101TFEU)
Conditions under the Block Exemption Regulation	States that Article 5 excludes certain obligations from the exemption, even though the market threshold is not exceeded. Also states that the exemption continues to apply to the remaining part of the vertical agreement if the problematic obligation is severable. Discusses exclusions from the exemption, including: • Non-compete obligations. Generally, non-compete obligations are not covered unless limited to five years or less, or that require the explicit consent of both parties to renew. • Post term non-compete obligations. Such obligations are *normally* not covered unless the obligation is indispensable to protect know-how and is limited to one year. • Restriction of sales of competing goods in a selective distribution system. Generally, a restriction preventing dealers from buying products for resale from specific competing buyers is not covered.	Individual cases of hardcore sales restrictions that may fall outside of Article 101(1) TFEU or may fulfill the conditions of Article 101(3)TFEU. Replaced with a new section. This new section states that hardcore restrictions may be objectively necessary in exceptional cases for an agreement of a particular type or nature. "*For example, a hardcore restriction may be objectively necessary to ensure that a public ban on selling dangerous substances to certain customers for reasons of safety or health is respected.* " Efficiency defence- Undertakings may always plead an efficiency defence under Article 101(3)TFEU in an individual case. Examples of (re)sale restrictions which may be acceptable have been added, namely: • Where substantial investments by the distributor to start up and/or develop the *new market* are necessary, restrictions of passive sales by other distributors into such a territory or to such a customer group which are necessary for the distributor to recoup those investments *during the first two years* that the distributor is selling the contract goods or services in that territory or to that customer group. • In the case of *genuine testing of a new product* in a limited territory or with a limited customer group and in the case of a staggered introduction of a new product, the distributors appointed to sell the new product on the test market or to participate in the first round(s) of the staggered introduction may be restricted in their active selling outside the test market or the market(s) where the product is first introduced *for the period necessary for the testing or introduction* of the product.

RELEVANT SECTION	2000 VERTICALS REGIME (ARTICLE 81 EC)	2010 VERTICALS REGIME (ARTICLE 101TFEU)
		• If appointed wholesalers located in different territories are obliged to invest in promotional activities in their designated territories to support the sales by appointed retailers, and it is not practical to specify in a contract the required promotional activities, restrictions on active sales by the whole-salers to appointed retailers in other wholesalers' territories *to overcome possible free riding*. • Where a manufacturer agrees to dual pricing with its distributors, because *selling online leads to substantially higher costs* for the manufacturer than offline sales.
The relevant market for calculating the 30 percent market share threshold under the Block Exemption Regulation	Relevant market share- Market share of the supplier determines whether the block exemption applies. Only in the case of exclusive supply is the market share of the buyer decisive.	Relevant market share- Revises section to state that market share of both the supplier and the buyer determine whether the block exemption applies. "For agreements between small and medium-sized undertakings, it is generally not necessary to calculate market shares." Product market definition- Adds that retail markets may also be wider than the final consumers' search area where homogeneous market conditions and overlapping local or regional catchment areas exist. Multiple parties- Adds that where one party to the agreement sells the contract goods or services to another party to the agreement, its market share must not exceed 30 percent as either a buyer or supplier for the exemption to apply. Replacement parts- A new section added to the effect that, in practice, the issue is whether a significant proportion of buyers make their choice by taking into account the "lifetime" costs of the product. If so, it indicates there is one market for the original equipment and spare parts combined.

Relevant Section	2000 Verticals Regime (Article 81 EC)	2010 Verticals Regime (Article 101TFEU)
Enforcement Policy in Individual Cases		
Recommended and maximum resale prices	Maximum resale price- The most important factor for assessing possible anticompetitive effects of maximum or recommended resale prices was the market position of the supplier. The stronger the market position of the supplier, the higher the risk that a maximum resale price or a recommended resale price would lead to a more or less uniform application of that price level by the resellers, because they may use it as a focal point for their pricing policies. The second most important factor for assessing possible anti-competitive effects of the practice of maximum and recommended prices was the *market position of competitors*. Especially in a narrow oligopoly situation, the practice of using or publishing maximum or recommended prices might facilitate collusion between the suppliers by exchanging information on the preferred price level and by reducing the likelihood of lower resale prices. The practice of imposing a maximum resale price or recommending resale prices leading to such effects might also infringe Article 81(1)EC.	Maximum resale price- Generally, the Guidelines have been changed to be more accepting of maximum resale prices. The sentence that states that the practice of imposing a maximum resale price or recommending a resale price may infringe Article 101(1)TFEU if it leads to a uniform price level has, for example, been deleted. The new Guidelines also delete the paragraph discussing the importance of analyzing the market position of competitors in assessing maximum resale prices. This is replaced with a new sentence which states that "*a maximum resale price may also help to ensure that the brand in question competes more forcefully with other brands, including own label products, distributed by the same distributor*." A new section has been added which discusses resale price maintenance and maximum resale price. Resale price maintenance- Adds section on resale price maintenance (RPM). Discusses possible efficiencies related to RPM, including: • Inducing distributors to better take into account the manufacturer's interest to promote a new product during an introductory period of expanding demand. • Organizing in a franchise system or similar distribution system applying a uniform distribution format for a coordinated short term low price campaign (*e.g.* 2 to 6 weeks "*in most cases*"). • Preventing "free riding" at the distribution level.

RELEVANT SECTION	2000 VERTICALS REGIME (ARTICLE 81 EC)	2010 VERTICALS REGIME (ARTICLE 101TFEU)
Upfront Access Payments	No explicit reference is made to the topic.	The new Guidelines note that upfront access payments might result in anti-competitive foreclosure of other suppliers, where the widespread use of such upfront access payments increases barriers to entry for small entrants. As such, "*upfront access payments may have the same downstream foreclosure effect as an exclusive supply type of obligation.*" Upfront access payments are also noted to be likely to increase the prices charged by the supplier for the contract products since the supplier must cover the expense of those payments. However, it is also acknowledged that the use of upfront access payments may in many cases contribute to an efficient allocation of shelf space for new products.
Category Management	No explicit reference is made to the topic.	The new Guidelines note that although category management agreements will not be problematic as a general rule, they may sometimes distort competition between suppliers, and finally result in the anti-competitive foreclosure of other suppliers, where the so-called "category captain" is able, due to its influence over the marketing decisions of the distributor, to limit or disadvantage the distribution of products of competing suppliers. Category management agreements are also noted, on the other hand, to allow distributors to have access to the supplier's marketing expertise for a certain group of products and to achieve economies of scale, as they ensure that the optimal quantity of products is presented in a timely manner and directly on the shelves.