

Selective distribution

Selective Distribution and e-Commerce: Recent developments in EU and national case law

Anticompetitive practices, Distribution agreement, Prices, Resale price maintenance, Selective distribution, Foreword, Internet, All business sectors

Note from the Editors: although the e-Competitions editors are doing their best to build a comprehensive set of the leading EU and national antitrust cases, the completeness of the database cannot be guaranteed. The present foreword seeks to provide readers with a view of the existing trends based primarily on cases reported in e-Competitions. Readers are welcome to bring any other relevant cases to the attention of the editors.

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I. Introduction

Selective distribution has solidly established itself among the distribution modalities legally available to both suppliers and buyers under European antitrust law, having confirmed its legal and commercial success for decades. The most expensive square meters of our high streets bear witness to the success of this distribution model. Those sectors where Europe has achieved a particular global leadership and competitiveness, such as the luxury, hi-fi or car industries, have relied extensively on selective distribution as the cornerstone of their supply policies. Many other sectors have recently joined the group. Thousands of SMEs have thrived under its umbrella; yet still, paradoxically, selective distribution is somewhat a victim of its success.

While still preserving its legitimacy, selective distribution has suffered from a continued and significant erosion of its traditional legal foundations during the last few years, following persistent challenges from antagonists, *e.g.*, the limitation of its scope to the “reserved territories”; strict conditions of application in the intersection with Internet commerce, including a limitation of the location clause concept; narrowing the scope for combining selective distribution with other restrictions, such as exclusivities; antitrust vigilance whenever discounters’ method of sales are involved; legal uncertainty in the treatment of *numerus clausus* policies and other quantitative restrictions; or the ambiguities in terms of the products or services that are eligible to benefit from selective distribution.

More importantly, it should be borne in mind that selective distribution has moved from its once privileged position of immunity under the first paragraph of Article 101 TFEU, essentially when certain circumstances were met in terms of suppliers respecting a fair, objective, non-discriminatory and quality-centric framework, to being structurally addressed by regulators in the more challenging category of a legal exception to a hard core restriction. This difference in the formal starting point

for the legal assessment is not banal. Furthermore, new attacks against the selective distribution model have recently emanated from Internet aggregators' interests. These have tried to revert the antitrust 'gaze' back to the potentially more severe category of possible antitrust infringements related to price, instead of the classic territorial restrictions 'effects' discussions. As e-Concurrences has shown through its numerous notes, a renewed wealth of precedents, including a great number from national competition authorities and courts, are shaping the form of this 'new century' legal framework for selective distribution where the basic foundations of this unique distribution model are rediscovered and likely to be reasserted. Simultaneously, undoubtedly, Internet commerce is demanding a more sophisticated assessment by the antitrust practitioner in this area.

A refreshed selective distribution legal framework, necessarily adjusted to the e-commerce realities, is likely to continue to play an important role in European distribution. Selective distribution may also be called upon to contribute positively to other antitrust jurisdictions, such as China, with regard to the understanding of a number of fundamental qualitative aspects about the interaction between suppliers, retailers and consumers, which encapsulates the desire to differentiate high added-value offered to consumers in the most sophisticated sectors.

This introductory article to the special issue of e-concurrence on selective distribution will set out the fundamental economic and legal elements underlying the selective distribution model. This article will touch upon most significant issues which are presently under consideration by European competition authorities and judges the resolution of which will hopefully clarify what appears to constitute a readjustment period for selective distribution.

II. The Economics of Selective Distribution

Selective distribution represents a valuable mechanism through which manufacturers may arrange the resale of their products to consumers. From an economics standpoint, the application of selective distribution may give rise both to efficiencies and competition risks. The latter include: [1]

- a. softening of competition and/or facilitation of collusion between retailers (reduction of intra-brand competition);
- b. foreclosure of certain categories of retailers; and,
- c. softening of competition and/or facilitation of collusion between the supplier and its competitors (reduction in inter-brand competition).

These negative effects could be accentuated when several suppliers and their retailers organize their trade in a similar way, leading to so-called 'cumulative effects'. [2]

However, some economists argue that restricting the number or types of retailers and thus accepting the strictures of selective distribution [3] represent a significant economic cost for manufacturers and upstream suppliers which, *ceteris paribus*, they would not be willing to undertake unless there is some offsetting benefit involved (*e.g.*, the benefits that the establishment of a selective distribution network imparts to their products). [4]

Indeed, the European Commission (the "Commission") acknowledges that selective distribution may lead to a number of efficiencies. In particular, by requiring the same or similar investments and marketing activities from all authorized retailers, selective distribution agreements may help solve free-rider problems [5] and/or create a brand image for the product in question. [6] For these types

of efficiencies, the nature of the product is considered to be of particular importance: efficiencies are more likely to be achieved in relation to new products, complex products, products whose qualities are difficult to judge before consumption (so-called “experience” products) or whose qualities are difficult to judge even after consumption (so-called “credence” products). [7] It is also useful to note that the nature of the product is particularly important for the assessment of the brick-and-mortar requirement. [8]

Other possible efficiencies that may be achieved through selective distribution, irrespective of the nature of the product in question, are savings in logistical costs due to economies of scale in various commercial aspects of distribution. [9] Selective distribution may also increase retailers’ sales efforts, thereby addressing the “vertical externality issue”. [10] Finally, in combination with location clauses, selective distribution may protect substantial and relation-specific investments made by the authorized retailer. [11]

III. The Legal Framework of Selective Distribution

A. Definition and Treatment of Selective Distribution

As indicated above, selective distribution represents a valuable mechanism through which manufacturers may arrange the sale of their products to consumers. One of the key features of selective distribution is that it enables manufacturers to restrict the number of authorized retailers thereby ensuring that they retain a certain degree of control in the way their goods reach consumers. [12] Suppliers operating a selective distribution network may appoint authorized retailers on the basis of pre-determined criteria (see below), and stipulate that the products may only be sold to other authorized retailers and consumers. [13] Insofar as EU competition rules are concerned, the benefit of a “closed” selective distribution network has been traditionally understood as a key *prerogative* for manufacturers, and not a condition. [14] Nonetheless, recent developments in the EU have cast doubt on the way selective distribution is used by some market players and EU decision makers have called for the adoption of a consistent approach regarding the objectivity and “closed” nature of selective distribution networks, so that *“the Commission [ensures] that the rules on selective distribution are properly applied, in order to avoid abuses and discrimination.”* [15]

A question that often arises relates to the type of products that are eligible for sale under selective distribution. Both the Commission and the Court of Justice of the EU (the “CJEU”) have provided significant guidance in this respect. Requirements relating to the point of sale, commercial staffing and servicing arrangements have been deemed acceptable with respect to a variety of products, such as luxury cosmetics, [16] cameras, [17] televisions, hi-fi and similar products, [18] high quality watches and clocks, [19] computers [20] and newspapers. [21] However, the new vertical restraints regime, applicable since 2010, brought about certain nuances to the scope of the “safe harbor” provided by the vBER: [22]

*“The Block Exemption regulation exempts selective distribution regardless of the nature of the product concerned **and regardless of the nature of the selection criteria.** However, where the characteristics of the product do not require selective distribution **or do not require the applied criteria** [...] such a distribution system does not generally bring about sufficient efficiency enhancing effects to counterbalance a*

significant reduction in intra-brand competition.” [23]

In practice, when assessing borderline situations where the legality of the system or the prevailing efficiencies is unclear (in particular above the 30% market share threshold established in the *vBER*), the lawful character of a selective distribution network will be determined by the authorities by weighing the obligations required from the retailers against the nature of the products in question. [24]

B. Selection Criteria

Selective distribution systems may be based on qualitative and/or quantitative criteria established by manufacturers. According to long-standing case law, pure *qualitative* selective distribution systems are generally declared to fall outside the scope of Article 101(1) TFEU insofar as they fulfill the following conditions: [25]

- i. the legitimacy of the requirement to use selective distribution for the products in question;
- ii. the objectivity and proportionality of the qualitative criteria; and
- iii. the non-discriminatory application of the criteria to all retailers.

However, when a selective distribution is based on *quantitative* criteria (either alone or combined with qualitative requirements), the CJEU has traditionally considered these to be subject to the application of Article 101(1) TFEU, but capable of being exempted under the *vBER* or Article 101(3) TFEU.

Quantitative selective distribution has strayed back into the cross-hairs of national courts and the CJEU in recent years. In *Auto 24 v Jaguar*, which stemmed from a reference for a preliminary ruling by the French Supreme Court, the CJEU indicated that the quantitative criterion whereby a manufacturer limited the number of authorized retailers in a particular territory (the so-called *numerus clausus*) only needed to be “verifiable” for the selective distribution system to be lawful; it was not necessary to prove that the criterion was objectively justified or applied uniformly across the system. [26] While the CJEU relied substantially on the language of the *Motor Vehicle Block Exemption Regulation*, [27] this ruling has generally been perceived as laying down a paradigm applicable *mutatis mutandis* to the *vBER*. [28] Nonetheless, it should be borne in mind that the Commission’s past assessment of quantitative criteria has generally encompassed a *minimum* analysis of their justified character. [29] The question regarding the treatment of *numerus clausus* criteria is important for a wide array of industries, particularly the sector involving the sale of new motor vehicles and spare parts. [30] As such, there is no doubt that the role that the Commission will play as *amicus curiae* in further cases before national courts will be key in clarifying this concept.

C. Selective Distribution and the Internet

A further key area will be the Commission’s intervention as *amicus curiae* before national courts in cases that affect selective distribution and the Internet. E-commerce has shaken selective distribution out of its ‘comfort zone’ and specific questions, such as the “overall equivalence” [31] between the criteria established for *online* and *offline* sales, have only just started to be addressed at EU and national level. In 2011, the CJEU overruled the more lenient approach towards prohibitions of online sales that had been adopted so far at national level, [32] and declared that an outright ban on the use of the Internet to sell dermo-cosmetic products was not objectively justified (thus falling

within Article 101(1) TFEU) and could not be exempted under the *vBER*. [33] The CJEU judgment was followed by the national court that requested the reference, and has been further applied by other national authorities, such as the French Competition Authority and the UK Office of Fair Trading. [34] Furthermore, the decision adopted by the French Competition Authority in the *Bang & Olufsen* case is particularly illustrative, insofar as the facts entailed an alleged *de facto* prohibition of Internet sales. [35]

Having accepted that online sales should generally remain available across the EEA, the question shifts to the limits to which the “overall equivalence” principle can be taken. The Commission has provided general guidance on the application of this principle, for example, regarding the use of third-party platforms and the requirement to hold a brick-and-mortar store before engaging in online sales. [36] However, despite the Commission’s efforts, as *amicus curiae*, the homogeneous application of this principle seems challenging to say the least. With regard to the use of third-party platforms, initial jurisprudence on the matter (originating mainly in Germany) appeared to support the discretion of manufacturers to prohibit sales by retailers through third-party platforms which do not fulfill their qualitative criteria. [37] However, the opening of investigations by the German Federal Cartel Office in 2012 against manufacturers of audio and sports equipment over alleged restrictions of sales on third-party platforms, [38] and the recent ruling by the *Higher Regional Court* of Berlin, which banned prohibitions of online sales of schoolbags, [39] have added to the confusion among stakeholders.

As regards the right of suppliers to require that an authorized retailer operates one or more brick-and-mortar stores, the French Competition Authority recently stated that *“it cannot be excluded that, for certain products, the more the manufacturer requires its distributors on the Internet to meet specific, numerous and demanding criteria, the more difficult it will be therefore to justify the exclusion from its selective distribution network of distributors which do not have a brick-and-mortar outlet.”* [40] This seems to somewhat contradict the Commission’s statement regarding the unconditional ability of manufacturers to require that its distributors have one or more brick-and-mortar stores in order to be admitted to the network. [41] As ever, divergent approaches across the EEA can eventually undermine legal certainty and could potentially interfere with the sustainable expansion of e-commerce in Europe.

It also bears mentioning that the French Competition Authority has referred to the possible cumulative effects that might arise from the establishment of similar online criteria by different manufacturers and their requirement that similar competing brands are made available on the same distributor’s website. The Authority has noted that this may lead to a shift in the conditions of selectivity of the retailers towards the strictest criteria imposed by a particular manufacturer. It appears these concerns seem to relate to the possibility that the qualitative criteria for online sales imposed by different manufacturers (*de facto*) align at levels that are not objective and proportionate in view of the characteristics of certain products. However, what is clear is that the possible foreclosure of potential candidates to the selective distribution networks lies at the heart of the French Competition Authority’s concerns. [42]

Finally, manufacturers selling their products in Europe tend to express concern as to the ability to preserve the balance of their networks. The exponential growth of online sales has been achieved at the cost of the brick-and-mortar outlets, which often find themselves in the ironic position of being amongst the highest (yet unrewarded) contributors to brand value and recognition. [43] While the

Commission has provided some guidance as to possible means to achieve this much needed balance between online and offline sales (*e.g.*, requiring a minimum amount of offline sales and establishing a fixed-fee to support offline and/or online sales efforts), [44] the French Competition Authority has deepened its study by exploring practical mechanisms to implement the Commission's *Guidelines on Vertical Restraints* in this regard. [45] However, this area and, in particular, any aspect related to price discrimination remains challenging for antitrust practitioners trying to reconcile business realities with the ambiguities of EU competition rules.

D. Selective Distribution and Pricing

From the outset, challengers of selective distribution networks have purposefully attempted to establish a connection between these arrangements and others that have been generally considered as being more restrictive of competition, such as price fixing. In *Metro (I)*, the CJEU delivered a carefully worded assessment of the economics of selective distribution, of which price constitutes an important component: “[f]or specialist wholesalers and retailers the desire to maintain a certain price level, which corresponds to the desire to preserve, in the interests of consumers, the possibility of the continued existence of this channel of distribution in conjunction with new methods of distribution based on a different type of competition policy, forms one of the objectives which may be pursued without necessarily falling under the prohibition contained in article [101(1)], and, if it does fall thereunder, either wholly or in part, coming within the framework of article [101(3)]. This argument is strengthened if, in addition, such conditions promote improved competition inasmuch as it relates to factors other than prices.” [46] The Court recognized that selective distribution is a means to protect the sales efforts and investments undertaken by the authorized distributors of a particular product, and admitted that this would have a *tolerable* impact on the prices that these distributors charge on consumers. [47]

Notwithstanding the above, the CJEU later confirmed that “*certain price levels*”, the existence of which it was willing to accept in *Metro (I)*, do not constitute, in and of themselves, a legitimization of selective distribution. In *AEG*, the CJEU indicated that a manufacturer operating a selective distribution system “[is] not justified in taking the view that the acceptance of a commitment to charge prices making possible a sufficiently high profit margin constitutes a lawful condition for admission to a selective distribution system.” [48] As such, in order to ensure the legality of their networks, manufacturers tend to refrain from establishing criteria related to the level of prices that their authorized retailers should charge.

A different question relates to whether price-related obligations should be considered restrictive of EU competition rules, particularly where efficiencies similar to those created by selective distribution are being targeted. In this regard, it is necessary to recall the evolution on the treatment of vertical price-related restraints (*e.g.*, RPM). [49] While the ‘wall’ that was *per se* treatment of RPM finally came down in the U.S. in 2007 with the advent of *Leegin*, the ripple effect has not stretched across the Atlantic. [50] Recent treatment of RPM at national level has been strict, [51] especially when involving e-commerce, [52] and it seems that any selective distribution agreement that produces an effect akin to RPM will be treated in a similar way. [53] It is worth noting, nonetheless, that at least on one occasion a national competition authority seemed to recognize the pro-competitive efficiencies derived from the selective use of RPM by a manufacturer. [54]

IV. Evolution and Future Trends

As the retail trade in the EU evolves and moves increasingly online, selective distribution will also be subject to a number of challenges. In particular, the brick-and-mortar requirement has successfully provided sufficient incentives for both suppliers and their distributors to invest in brand and product creation, and the preservation of this delicate investment equilibrium is arguably of pivotal importance for the European manufacturing sector going forward. [55] While the Commission treats the Internet as a means to merge 28 national markets into one, any changes to the cornerstones of selective distribution should be carefully considered.

A. Selective Distribution and e-Commerce

Up until now, manufacturers have viewed selective distribution as an acceptable by-product of the specificities of the EU model. Furthermore, the retail sphere was rooted predominantly in the high street; e-commerce was still in its infancy and so viewed as a mere “add-on”. However, is this still the case in light of the globalization of commerce? [56] A plethora of proposals and reforms are being envisaged as part of the EU *Digital Agenda* [57] package that could either undermine or strengthen the integrity of selective distribution.

In particular, trustmarks (online signage indicating quality and reliability of a given retailer site) might turn to be of key importance for regulators and manufacturers alike. In its consultations, the Commission has acknowledged the potential it believes trustmarks hold to generate *a positive effect on cross-border e-commerce*. [58] Consequently, the Commission has advocated establishing an “EU Trustmark” as a means of stimulating e-commerce by creating a more trusted online environment. [59]

When considered in separation, selective distribution networks have arguably no need for trustmarks, since an authorized retailer will be able to rely on the brand recognition of the manufacturer or its own. However, the criteria for using trustmarks do not currently require that a particular reseller of selective distribution products be an authorized retailer/member of that network. Consequently, unauthorized ‘grey-market’ resellers have been able to display trustmarks (including in search results pages) merely for providing delivery guarantees or returns policy. This is confusing to consumers who are expecting an authorized retailer-level advice and information on the products from those presumably ‘legitimate’ resellers. This in turn not only has a negative impact on the brand and product image but, more importantly, decreases consumers’ trust online and holds back e-commerce growth. In this sense, manufacturers operating selective distribution networks might have an interest in working towards integrating both concepts: trustmarks and a selective distribution network authorization.

B. International context

1. EU-US & EU-Canada Trade Agreements

In light of the concluded EU and Canada negotiations on the Comprehensive Economic and Trade Agreement (“CETA”), as well as the ongoing EU-U.S. negotiations on the Transatlantic Trade and Investment Partnership (“TTIP”), it is worth mentioning that U.S. law generally affords the manufacturer/supplier with broad economic liberty as to how, and in what form, their products reach the consumer. [60] It remains to be seen how the CETA and the TTIP would treat the natural

limitations of EU selective distribution networks in the context of transatlantic trade.

While the CETA provisions seek to enhance the multijurisdictional protection of IP, they do not go beyond the protection level already provided for in the EU. [61] With regard to e-commerce, initial provisions aimed at introducing stricter monitoring and enforcement powers were removed to reflect the fact that the Anti-Counterfeiting Trade Agreement (“ACTA”) had been rejected by the European Parliament. Therefore, the CETA provision regarding e-commerce will necessarily be based on the *E-commerce Directive (2000)*, [62] and is unlikely to change the legislative landscape further.

As regards the TTIP, its overall objective with respect to e-commerce seems to be the improvement of conditions for market access. [63] Nonetheless, it remains to be seen what this will mean for selective distribution networks. The EU’s proposal seems to preliminarily recognize that online goods and services acquired from an overseas supplier should not be subject to customs duties [64] and this could arguably push retail trade further into the online domain. Time will tell whether these transatlantic partnerships aimed at harmonizing trade conditions will dilute a number of the remaining offline protections afforded to manufacturers under the current EU model in choosing how their goods reach consumers, as well as the scope of recognition and protection of trademarks and other IP rights under traditional exhaustion principles.

2. China

The European industry that has successfully tested selective distribution policies in Europe for many years will naturally attempt replicate this business model in China, while adjusting to local peculiarities. In parallel, China’s economy continues to grow locally, including the size and capabilities of its national manufacturers and distributors who will tend to start operating under more sophisticated vertical agreement schemes. Finally, it is worth noting the existence of strong Chinese e-commerce champions which are already operating at a cross-border level in Asia.

At its current stage, the EU policy on vertical restraints seems to be strongly influencing the evolution of the Chinese antitrust regime regarding distribution aspects. Therefore, we seem to be moving from a system which in practice gave manufacturers a wide discretion in their distribution policies to a more regulated environment along the lines of the EU model. [65] It remains to be seen how the Chinese antitrust enforcers and policy makers will deal with selective distribution.

V. Conclusion

It would appear that selective distribution is entering into what can only be regarded as a legislative “climate change”, and the relevance of the adage “we live in uncertain times” will only become more prominent. There are many divergent interests and factors that must be balanced by the EU legislators in order to ensure that an environment conducive to growing e-commerce is created. However, selective distribution has a tremendous card to play in the upcoming debates provided it is able to demonstrate its contribution to a different “trusted” and better quality e-commerce environment option for consumers. There will be numerous opportunities in the near future to reassert its specific added value for the economy in general and the consumers’ welfare in particular (*e.g.*, in the future EU legislative initiatives or Free Trade Agreements).

It is anticipated that, while limited in scope, selective distribution will still have a role to play in the

future legal architecture, and the size of that contribution will depend entirely on whether the EU legislature manages to recognize the potential value of the selective distribution ‘wood’ through the Digital Agenda’s ‘trees’. Some light can be shed on this by looking to recent enforcement trends at national and European-Brussels levels. [66]

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[1] See *Guidelines on Vertical Restraints*, OJ C 130, 19.5.2010, pp. 1-46 (the “**Guidelines on Vertical Restraints**”), at paras. 100 and 175.

[2] *Ibid*, at para. 179. The existence of “cumulative effects” may lead to withdrawal of the block exemption under *Regulation No 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices* (OJ L 102, 23.4.2010, pp. 1-7) (the “**vBER**”) or disapplication of the vBER. However, a cumulative effect problem is unlikely to arise when the share of the market covered by selective distribution is below 50 % (*Guidelines on Vertical Restraints*, at para. 179).

[3] Including, *e.g.*, monitoring compliance or undertaking grey market actions against unauthorized resellers.

[4] See, *e.g.*, Lester G. Telser, *Why should manufacturers want fair trade*, 1960, *Journal of Law and Economics* 3, pp. 86-105; Benjamin Klein and Kevin M. Murphy, *Vertical Restraints as Contract Enforcement Mechanisms*, 1988, *Journal of Law and Economics*, pp. 265-297.

[5] *Ibid*, at paras. 107(a) and 185.

[6] The enhancement of product brand image via distribution through only select retailers is one of the primary efficiencies attained by selective distribution. See *Guidelines on Vertical Restraints*, at paras. 107(i) and 185. Suppliers tend to choose this system because demand for the product is significantly enhanced by the investment in image and customer service.

[7] *Ibid*, at para. 185.

[8] In particular, the *Guidelines on Vertical Restraints* indicate that the nature of the product should weigh in favor of the brick-and-mortar requirement (para. 176).

[9] *Ibid*, at paras. 107(g) and 185. Such economies of scale may be realized especially if selective distribution is accompanied by minimum purchasing or exclusive sourcing requirements.

[10] *Ibid*, at para. 107(f).

[11] The so-called “sole distribution”; see *ibid*, at paras. 107(d) and 185.

[12] See *Guidelines on Vertical Restraints*, at para. 174.

[13] See the vBER, at Article 4(b)(iii), *a contrario*.

[14] See Case C-376/92 *Metro SB v Cartier* [1994] ECR I-15, at paras. 24 et seq: “the *“imperviousness” of a selective distribution system is not a condition of its validity under Community law.*”

[15] See *European Parliament resolution of 11 December 2012 on completing the Digital Single Market* (2012/2030(INI)). See further the *European Parliament resolution of 21 September 2010 on completing the internal market for e-commerce* (2010/2012(INI)): “[the European Parliament] [s]tresses the need to monitor the application of the rules recently adopted in Commission Regulation (EU) No 330/2010 of 20 April 2010 on exclusive and selective distribution”.

[16] See, e.g., C-99/79 *Lancome SA etc v Etos BV* [1980] ECR p. 2511; and Case T-88/92 *Groupement d’Achat Édouard Leclerc v Commission* [1996] ECR II-1961.

[17] See, e.g., Case IV/24.055 – *Kodak*, OJ L 147, 7.7.1970, p. 24.

[18] See, e.g., Case IV/847 – *SABA*, OJ L 28, 3.2.1976, p. 19, upheld by the CJEU in Case 26/76 *Metro v Commission* [1977] ECR p. 1875; Case IV/34.114 – *Kenwood Electronics Deutschland* (Car Audio), OJ C 67, 10.3.1993, p. 9; and Case IV/34.084 – *Sony España*, OJ C 275, 13.10.1993, p. 3.

[19] See, e.g., Case IV/5.715 – *Junghans*, OJ L 30, 2.2.1977, p. 10; and Case C-376/92 *Metro SB v Cartier* [1994] ECR I-15. See, however, Case 31/85 *ETA v DK Investment* [1985] ECR p. 3933, where the CJEU refused to accept that a selective distribution system was justified for mass produced ‘Swatch’ watches. See also *Chanel*, XXVth Report on Competition Policy (1995), at p. 136, where the Commission granted informal clearance to a selective distribution system for luxury watches after amending its terms to incorporate objective qualitative criteria for the selection of dealers.

[20] See, e.g., Case IV/30.849 – *IBM Personal Computer*, OJ L118, 4.5.1984, p. 24; and Case IV/32.034 – *Computerland*, OJ L 222, 10.8.1987, p. 12.

[21] Although this point was left open in Case 126/80 *Salonia v Poidomani and Giglio* [1981] ECR p. 1563, it was accepted in Case 243/83 *Binon v AMP* [1985] ECR p. 2015.

[22] See *Commission Regulation (EU) No 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 L 102, 23.4.2010, pp. 1-7.

[23] See *Guidelines on Vertical Restraints*, at para. 176 (emphasis added).

[24] See, e.g., the recent ruling of the French Supreme Court, Case *Pierre Fabre v CDS, MAD et al.*, 24 September 2013, which established that the requirement that a person holding a diploma in pharmacy be present at the point of sale was not necessary with regard to dermo-cosmetic products.

[25] See *Guidelines on Vertical Restraints*, at para. 175. See Case T-19/92 *Leclerc v Commission* (“YSL”) [1996] ECR II-1851, at para. 112; and Case T-88/92 *Leclerc v Commission* (“Givenchy”) [1996] ECR II-1961. By contrast, the establishment of several qualitative selective distribution networks on a given market may give rise to the application of Article 101(1) TFEU as a result of their cumulative effects on competition (see Case C 75/84 *Metro v Commission* [1986] ECR p. 3021, at para. 41).

[26] See Case C-158/11 *Auto 24 v Jaguar* [2012], not yet reported . See [Gavin Bushell, The European Court of Justice rules on selective distribution on the motor vehicles industry \(Auto 24\), 14 June 2012, e-Competitions Bulletin June 2012, Art. n° 48167.](#)

[27] See *Commission Regulation (EC) No 1400/2002 of 31 July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector*, OJ L 203, 1.8.2002, pp. 30-41, at Article, 1(1)(g).

[28] This is not without justification: para. 175 of the *Guidelines on Vertical Restraints* similarly states that “[q]uantitative selective distribution adds further criteria for selection that more directly limit the potential number of dealers by, for instance, [...] fixing the number of dealers.” Furthermore, the approach adopted by the CJEU seems to have been supported by the French government intervening in the case and, with some nuances, by the Commission acting as *amicus curiae* in a similar case (see [David Spector, Joseph Vogel, Etienne Pfister, Réseaux de distribution et droit de la concurrence, February 2012, Concurrences Journal N° 1-2012, Art. N° 41684](#); [Dominique Ferré, Quantitative selective distribution: The Court of cassation considers that quantitative criteria shall have a precise content that can be verified but that it is not necessary to objectively justify the quantitative criterion chosen \(Seeb/Castes\), May 2013, Concurrences Journal N° 2-2013, Art. N° 52179, p. 88](#)).

[29] See, *e.g.*, Case COMP/3.213 - *Omega*, OJ L 242, 5.11.1970, pp. 22-30, where the Commission justified the limitation of the number of authorized retailers due to the limited number of Omega luxury watches that were produced each year and the ability for Omega’s agents to determine the optimal number of retailers in view of the purchasing power of the local population. Such “minimum defined criteria” still seem to be required by the Commission (see [David Spector, Joseph Vogel, Etienne Pfister, Réseaux de distribution et droit de la concurrence, February 2012, Concurrences Journal N° 1-2012, Art. N° 41684](#)).

[30] This is particularly the case given that the *vBER* applies to this sector since 1 June 2013. See [Andrzej Kmiecik, The German Federal Court of Justice dismisses action of repair shop to be admitted to the authorized repair network of a commercial vehicle manufacturer based on alleged abuse of dominance, 30 March 2011, e-Competitions Bulletin March 2011, Art. n° 41137.](#)

[31] See *Guidelines on Vertical Restraints*, at para. 56.

[32] See [Jérôme Philippe, François Gordon, The Paris Court of Appeal upholds the legality of two restrictions on Internet sales by authorised retailers within a selective distribution network \(PMC Distribution / Pacific Création\), 18 April 2008, e-Competitions Bulletin April 2008, Art. N° 22598.](#)

[33] See [Joseph Vogel, The Paris Court of Appeal rules that dermo-cosmetic products do not have properties justifying the prohibition of their sale on the Internet \(Pierre Fabre\), 31 January 2013, e-Competitions Bulletin January 2013, Art. n° 51101.](#) Nonetheless, the CJEU established the possibility that a prohibition of online sales be individually exempted under Article 101(3) TFEU.

[34] See [Cédric Manara, The French Competition Authority fines a manufacturer which prohibited Internet sales by its distributors \(Bang & Olufsen\), 12 December 2012, e-Competitions Bulletin December 2012, Art. n° 50617](#); and Decision of the OFT, *Roma-branded mobility scooters: prohibitions on online sales and online price advertising* - CE/9578-12, 5 August 2013.

[35] See [Cédric Manara, The French Competition Authority fines a manufacturer which prohibited Internet sales by its distributors \(Bang & Olufsen\), 12 December 2012, e-Competitions Bulletin December 2012, Art. n° 50617](#). The French Competition Authority based its conclusions on the prohibition established in the contracts rolled out in 1989, coupled with the ongoing discussions between Bang & Olufsen and its retailers regarding online sales and the delay in the application of Bang & Olufsen's Internet guidelines.

[36] See *Guidelines on Vertical Restraints*, at para. 54.

[37] See [Wolfgang Bosch, The Higher Regional Court of Karlsruhe decides that sales via an internet auction platform can be prohibited in a selective distribution system which does not fall under Sec. 1 ARC/Art. 101 TFEU if the selection criteria are objective and applied in a non-discriminatory manner \(Scout-Schulranzen\), 25 November 2009, e-Competitions Bulletin November 2009, Art. N° 32013](#); [Andrzej Kmiecik, A German Court confirms judgment allowing a restriction on using auction websites in selective distribution, 25 November 2009, e-Competitions Bulletin November 2009, Art. N° 41674](#); and [Andrzej Kmiecik, A German Court accepts prohibition of selling through auction websites \(Amer\), 2 July 2009, e-Competitions Bulletin July 2009, Art. N° 41726](#).

[38] As regards the investigation related to the sale of headphones, see: <http://www.bundeskartellamt.de/wDeu...> For the investigation related to sports equipment, see: <http://www.arcor.de/content/digital...>
1480350,1,Wettbewerbswidrige-Vertr%C3%A4ge-bei-Amazon-Adidas-Asics-und-HRS,content.html.

[39] See [Andrzej Kmiecik, A German court rules on restrictions on sales through auction websites in the context of selective distribution \(Sternjakob\), 21 April 2009, e-Competitions Bulletin April 2009, Art. N° 42842](#), which was confirmed on appeal in September 2013. In the same vein, the European Parliament indicated in the *European Parliament resolution of 21 September 2010 on completing the internal market for e-commerce (2010/2012(INI))* that it “*expresse[d] concern regarding the Commission’s decision on the obligation of having an off-line shop prior to selling online as this requirement radically hampers online sales*” and “*call[ed] on the Commission to begin formulating European standards to facilitate cross-border e-commerce, to bridge variations between the laws in force within the various Member States and to remove the obligation within a selective distribution network of having an off-line shop prior to selling online, where it is shown that such an obligation is in contradiction with competition law, or is not justified by the nature of the contract for goods and services sold.*”

[40] See Opinion 12-A-20 of the French Competition Authority – *Sector enquiry into e-commerce*, at paras. 340 and 361-363 (unofficial translation); see [Alain Ronzano, e-commerce: The French Competition Authority publishes its opinion on regarding e-commerce and explains how it wants to get the "pure players" back in the game \(Avis sur le commerce électronique\), November 2012, Concurrences Journal N° 4-2012, Art. N° 52866](#).

[41] See *Guidelines on Vertical Restraints*, at para. 54.

[42] See Opinion 12-A-20 of the French Competition Authority – *Sector enquiry into e-commerce*, at paras. 340 and 361-363 (unofficial translation); see [Alain Ronzano, e-commerce: The French](#)

[Competition Authority publishes its opinion on regarding e-commerce and explains how it wants to get the "pure players" back in the game \(Avis sur le commerce électronique\), November 2012, Concurrences Journal N° 4-2012, Art. N° 52866.](#)

[43] See Andrea Coscelli, Thomas Buettner, Thibaud Vergé and Ralph A. Winter, An Economic Analysis of the Use of Selective Distribution by Luxury Goods Suppliers, *European Competition Journal*, 5, 201, 2009.

[44] See *Guidelines on Vertical Restraints*, at para. 52.

[45] See note 44 above *supra*.

[46] See Case 26/76 *Metro v Commission* [1977] ECR p. 1875, at para. 21.

[47] It should be borne in mind that, nonetheless, the Commission may find that competition is hindered due to the existence of multiple selective distribution systems. In *Metro (II)*, the CJEU indicated that “*there may nevertheless be a restriction or elimination of competition where the existence of a certain number of [selective distribution] systems does not leave any room for other forms of distribution based on a different type of competition policy or results in a rigidity in price structure which is not counterbalanced by other aspects of competition between products of the same brand and by the existence of effective competition between different brands*” (see Case 75/84 *Metro v Commission* [1986] ECR p. 3021, at para. 40).

[48] See Case 107/82 *AEG v Commission* [1983] ECR p. 3151, at para. 43.

[49] For further discussion of the economic assessment of RPM, see Andrés Font Galarza, Frank P. Maier-Rigaud, Pablo Figueroa, RPM Under EU Competition Law: Some Considerations from a Business and Economic Perspective, November 2013, *CPI Antitrust Chronicle*.

[50] See *Leegin Creative Leather Products, Inc. v. PSKS, Inc.* (2007) 551 U.S. 877; while it does not treat RPM as *per se* illegal, the EU denotes a strong presumption of illegality to towards any agreements either containing RPM, or those with the equivalent effect. However, *Guidelines on Vertical Restraints* at para. 223 concede that this presumption of illegality may be rebutted in certain circumstances.

[51] See [Article from the European Competition Network Brief, The German Competition Authority imposes fine totalling € 8.2 M for vertical resale price maintenance in tools selective distribution system \(Tooltechnic\), 20 August 2012, e-Competitions Bulletin August 2012, Art. n° 49688.](#)

[52] See [Tobias Caspary, The German Federal Cartel Office fines € 11.5 million a contact lens provider for fixing minimum resale prices and restricting Internet and wholesale sales of its products \(CIBA\), 25 September 2009, e-Competitions Bulletin September 2009, Art. n° 29823](#); See [Daniela Seeliger, The German Federal Cartel Office imposes a fine on the producer of hearing devices for having threatened or inflicted disadvantages on another company in order to induce a certain retail price level for the resale of hearing devices \(Phonak\), 14 October 2009, e-Competitions Bulletin October 2009, Art. n° 31726.](#)

[53] See [Gábor Fejes, Zoltan Marosi, The Hungarian Competition Authority finds illegal vertical resale price fixing without imposing fine \(Castrol Hungária\), 19 March 2009, e-Competitions Bulletin March 2009, Art. n° 31679](#); See [Gábor Fejes, Zoltan Marosi, The Hungarian Competition Authority condemns vertical resale price fixing agreement concluded between a wholesaler of medicines and pharmacies but without imposing a fine \(Hungharopharma\), 22 December 2008, e-Competitions Bulletin December 2008, Art. n° 31685](#).

[54] See [Attila Kőmíves, Daniel Szentkúti, The Hungarian Competition Office holds, in relation to the distribution of energy drinks, that selective resale price fixing is not a hardcore restriction \(Büki Ásványvíz- és Üdítőital Kereskedelmi\), 14 May 2008, e-Competitions Bulletin May 2008, Art. n° 21536](#).

[55] See for example, European Commission Memo, VP Tajani: we need an action plan for the fashion and high-end industries, MEMO/13/961, 6 November 2013, available at: <http://europa.eu/rapid/press-releas...>

[56] The Commission, in its e-commerce working paper, observes that during 2008-2010 e-commerce has grown from 28% to 63% for domestic business-to-consumer e-commerce, around 4% of the entire retail sector. This accounted to an estimated consumer welfare gain from e-commerce goods alone of around EUR 11.8 billion, or 0.12% of EU GDP. See *Commission Staff Working Document, 'Bringing e-commerce benefits to consumers'*, SEC (2011) 1640, 11 January 2012, at pp. 2-3.

[57] See <http://ec.europa.eu/digital-agenda/>.

[58] *Commission Staff Working Document, 'Bringing e-commerce benefits to consumers' (supra at 58)*, at p. 46.

[59] Trustmarks allow the manufacturer to convey to the consumer that its retailer of choice will provide excellent levels of service and advice. For a wide range of issues covered by trustmarks see TNO & Intrasoft, *EU Online Trustmark Building Digital Confidence in Europe SMART 2011/0022*, Interim Report Task, 10 May 2011.

[60] See e.g., *Computer Place v. HP* 607 F.Supp. 822 (1984), *MD Products, Inc. v. Callaway Golf Sales Co.*, 459 F.Supp.2d 434 (2006), *Jacobs v. Tempur-Pedic Int'l, Inc.*, 626 F.3d 1327 (2010).

[61] See European Commission Press Release, EU and Canada strike trade deal, MEX/13/1018, 18 October 2013, available at: <http://europa.eu/rapid/press-releas...> As of January 8, 2014, the final text of CETA has not been made public.

[62] See *Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market*, OJ L 178, 17.7.2000, pp. 1-16.

[63] See European Commission Position Paper, EU-US Transatlantic Trade and Investment Partnership: Technical barriers to trade, at p. 2, available at <http://trade.ec.europa.eu/doclib/do...>

[64] See European Commission Memo, Member States endorse EU-US trade and investment

negotiations, MEMO/13/564, 15 June 2013, available at: <http://europa.eu/rapid/press-releas...>

[65] China classifies certain vertical agreements as a type of ‘monopoly agreement’, explicitly prohibiting RPM (see Article 14, Anti-Monopoly Law of the PRC 2007. See *Beijing Ruibang Yonghe Science & Technology Trade Company v. Johnson & Johnson Medical (Shanghai) Ltd*), Judgment of Shanghai Higher People’s Court, 1 August 2013. Furthermore, Article 15 of the Anti-Monopoly Law provides a list of arrangements containing vertical restraints which can be exempted from the application of Chinese competition rules (*e.g.*, improving R&D, product quality, cost reduction and efficiency). Further guidance from the Chinese antitrust enforcers (SAIC; NDRC, MOFCOM and the judiciary) in the domain of vertical restraints is expected in the future not only in terms of enforcement but potentially also in the form of Policy Guidelines.

[66] See *e.g.*, the inspections conducted by the Commission into the consumer electronic goods sector (see: <http://online.wsj.com/news/articles...>); and the opening by the German Federal Cartel Office in 2012 of investigations against certain manufacturers of audio and sports equipment for the alleged restriction of sales on third-party platforms (see, *e.g.*, <http://www.bundeskartellamt.de/Shar...>).

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