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„Selective distribution agreements in the luxury world: from *Coty* to the review of the Vertical Block Exemption Regulation“

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Table of abbreviation

I.	Art.	Article
II.	Artt.	Articles
III.	CAT	Competition Appeal Tribunal
IV.	*Cf*	*Conferatur*
V.	CJEU	Court of Justice of European Union
VI.	CMA	Competition Market Authority
VII.	EC	European Commisison
VIII.	ECJ	European Competion Journal
IX.	EEA	European Economic Area
X.	*Et al.*	*et alia*
XI.	EU	European Union
XII.	EUIPO	European Union Intellectual Property Office
XIII.	EUTMR	European Trademark Directive
XIV.	FCA	French Competition Authority
XV.	GVR	Guidelines on Vertical Restraints
XVI.	ISP	Internet Sales Policy
XVII.	IP	Intellectual Property
XVIII.	JECL & Pract	Journal of European Competition Law & Practice
XIX.	MS	Member State
XX.	NCA	Non-Competition Authority
XXI.	Reg	Regulation
XXII.	TEC	Treaty of European Community
XXIII.	TFEU	Treaty on the Functioning of European Union
XXIV.	Para	Paragraph
XXV.	VBER	Vertical Block Exemption Regulation
XXVI.	W Comp	World Competition

Introduction

This thesis describes and analyses the Selective Distribution[1], known as the most frequently used distribution system by prestigious brands, which use it to enhance the aura of luxury and uniqueness of their products.
This because, the value of a brand is manifested not only by the physical or ideal characteristics of the product, but also, by the distribution channels and methods used.
It is clear, in fact, that in a globalised market, such as the current one, it is unlikely that sales can be managed exclusively by the manufacturing companies since the distributor became the direct intermediary of the end customer, with all the consequences that this entails, both in relation to the presentation and enhancement of the product, and in relation with the brand awareness itself.

The current European legislation and, in particular, article 1(a) of Regulation (EU) No. 330/2010, so called Block Exemption Regulation on Vertical Agreements[2], defines the selective distribution as a distribution system in which the supplier undertakes to sell the contracted goods or services, directly or indirectly, only to distributors individualized on the basis of specified criteria and in which these distributors undertake not to sell such goods or services to unauthorised resellers in the territory which the supplier has reserved for that system.

In essence, it is a system that is expressed in distribution networks that impose high subjective, objective and operational standards on distributors, aimed at providing customers with a superior pre-sales and post-sales "experience", which are justified by the European's principle of free competition, as long as the limits imposed are clear, specific, applied in a transparent manner and do not go beyond what is strictly necessary.

[1] A definition of selective distribution system under EU competition law is given in Commission Regulation (EU) 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 (Text with EEA relevance) [2010] OJ L 102, art. 1(1)(e).
[2] Commission Regulation (EU) 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 (Text with EEA relevance) [2010] OJ L 102 (VBER).

After defining and analysing the European framework besid such institution, this paper will deepen the concrete application of the legal principles governing it, through the analysis of the most relevant European, and domestic, case law precedents on the matter, from the well-known and fundamental *Coty* Case[3] to the more recent, but still relevant, *Nike / Action Sport / Amazon* Case[4].

Through this survey it will be possible to understand how, over the years, the evolution of case law has maintained a substantial continuity, developing concepts and ideas linked by a unique and constant thread. Even in such cases in which, in first instance, can be individualized an evident discontinuity, such as in *Asics* Case[5], in reality, the established principles on the matter are never subverted or disregarded but, more simply, the rulings focus on the application of the same principles to different concrete cases, reaching conclusions only apparently not consistent with the foremer case law.

Indeed, it may happen that different national judges have different attitude (also with respect to the culture of luxury and the valorization of this sector), but it is easy to state that, in each provision commented, the judge is conscious of the fact that his ruling on the topic will be addressed to be part of an already traced and solid jurisprudence, which keep consolidating and evolving, rather than changing.

If the luxury market is the one that, beyond any doubt, more than any other, represents the ideal boundary for the application for a selective distribution system, it is interesting to note how the case law under investigation has made it clear, in an unequivocal way, that the same rules and concepts can also be applied outside of this area, to non-luxuty products.

The above has also been demostrated by the recent, and already mentioned, *Nike / Action Sport / Amazon* Case, which sums up concepts and arguments already present in the fundamental and milestone case *Coty*.

The same strand of case law is realistically destined to characterise future and imminent regulatory developments. The former will become a certainty, as provided

[3] Case C-230/16 *Coty Germany GmbH vs Parfümerie Akzente GmbH* [2017] EU:C:2017:941 (*Coty*).

[4] Amsterdam Court of Appeal, *Nike European Operation Netherlands vs Action Sport* [2020] NL:GHAMS:2020:2004 (*Nike / Action Sport / Amazon*).

[5] Case T-581/17 *Asics Corporation vs European Union Intellectual Property Office* (EUIPO) [2018], EU:T:2018:685 (*Asics*).

by the Working Evaluation Document[6], specifically by the first phase of evaluation of the revision process, published by the European Commission. The document will review the VBER, expiring on May 31st, 2022, as will be illustrated in detail below. The European Commission, as it did with the release of the original VBER, is showing great sensitiveness to the needs of the market and, rightly, wants to come up with a new framework that, on the path marked by past experience, could address and regulate new market developments in a way that suits the new needs.

[6] European Commission (EC), COMMISSION STAFF WORKING DOCUMENT EXECUTIVE SUMMARY OF THE EVALUATION of the Vertical Block Exemption Regulation [2020] SWD/2020/0173

Chapter I

Art. 101 of the Treaty on the Functioning of the European Union and the Regulation of Vertical Agreements

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SUMMARY: I. The prohibition of anti-competitive agreements: the provisions of articles 101 and 102 of the Treaty on the Functioning of European Union – i. The broad definition of agreement under article 101 of the TFEU and the restrictions by object and by effect – ii. The differences between Vertical Agreements and Horizontal Agreements – II. Vertical Agreements and their assessment under Vertical block Exemption Regulation: three steps the framework's analysis. – i. The 2014 *De Minimis* Notice – ii. The Vertical Block Exemption Regulation No. 330/2010 – iii. Article 101(3) of the TFEU and the 2010 EU Commission Guidelines on Vertical Restraints – III. The Selective Distribution system and the "Metro Criteria" – i. Two leading cases of the European Court of Justice: – i.i. *Pierre Fabre* Case – CJEU – i.ii *Coty* Case - CJEU.

I. The prohibition of anti-competitive agreements: the provisions of articles 101 and 102 of the Treaty on the Functioning of European Union[7].

On March 25th, 1957 the Treaties of Rome were signed and entered into force on January 1st, 1958. Those two treaties (one establishing the European Economic Community and the second establishing the European Atomic Energy Community) became the foundation acts of the European Community. In fact, the Rome Treaty established a common market in the European Union, and, for the first time, a set of competition rules were introduced.

Two fundamental rules of the above-mentioned treaty were artt. 85 and 86 (originally artt. 81 and 82 of Treaty of the European Community), those articles were then renumbered in artt. 101 and 102 of the Treaty of the Functioning of the European Union.

Those are the fundamental principles of the European system, that have always been inspired by the value of a free economy in the market and whose scope is to grant an efficient and workable competition in which entrepreneurs compete on the same level, integrating domestic markets to a sole and unique European market.

Art. 101 and art. 102 of the TFEU rules how undertakings relate within the specific market and how they can alter the different outcome of the competition.

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[7] The Treaty on European Union and the Treaty on the Functioning of the European Union [2012] OJ C 326 (TFEU)

The definition of undertaking provided by those two articles is substantially an economic definition: each subject that might have an impact, even only a potential impact, on competition, is considered to be an undertaking[8], regardless its juridical nature, its internal organization or the way it is financed.
By way of example, the following have been considered undertakings within the meaning of the legislation under review: associations of self-employed professionals, lawyers and accountants.
Conversely, activities of a social nature, carried out in accordance with principles that are unrelated to market laws, are not considered undertakings for the purposes of EU competition law[9].
A further characteristic an undertaking, in order for it to be subject to the provisions in object, is the concrete and operational autonomy with which the activity is carried out. A formally autonomous company endowed with its own legal personality is not considered an undertaking within the meaning of artt. 101 and 102 of the TFEU, if the degree of control exercised over it by another company prevents it from operating as an independent economic entity.[10]

Both art. 101 and art. 102 of the TFEU are applicable when an anti-competitive conduct affects intra-community trade[11] between Member States and they both refer to the effect of the trade of goods and services within the EU.
The first refers to the prohibition of cartels and anticompetitive agreements whilst the second prohibits the abuse of dominant position and both of them have a general scope of application.
In general, in the European system, all economic sectors are theorically subject to the competition regime, with the partial exclusion of agriculture, for which it is foreseen that the provisions of the chapter relating to the rules of competition shall be applicable to the production and trade of agricultural products only to the extent determined by the European Parliament and the European Council, in accordance with the procedure set forth in art. 43 para. 2 of the TFEU, bearing in mind the objectives set forth in art. 39 of the TFEU: increase productivity, ensure a fair

[8] For definition of undertaking *cf.* C-41/90 *Klaus Höfner and Fritz Elser and Macrotron GmbH* [1991], para 21.
[9] See Case T-319/99 *Federación Nacional de Empresas de Instrumentación Científica, Médica, Técnica y Dental (FENIN) v Commission of the European Communities* [2003] EU:T:2003:50.
[10] See Case 170/83 *Hydrotherm Gerätebau GmbH v Compact del Dott. Ing. Mario Andreoli & C. Sas.* [1984] EU:C:1984:271.
[11] For definition of intra-community trade *cf.* Case C-125-07 *Erste Group Bank AG vs. Commission of the European Communities* [2009] EU:C:2009:576, para 36-41.

standard of living for the agricultural community, stabilize markets, ensure security of supply and, finally, ensure reasonable prices for consumers.

With regard to art. 102 of the TFEU, which alaysis will not be deepened further, it is important to highligh how this norm regulates the abuse of dominant position.
The provision prohibits the abusive exploitation of this type of supremacy position, enacted in order to reduce the competitive capacity of other operators or in order to implement market policies that take advantage of the absence, or reduction, of competition to the detriment of consumers. Therefore, the existence of a dominant position and the abusive exploitation of the same are the two elements that integrate the prohibition under art. 102 of the TFEU.

Whereas, for that concerns art. 101 of the TFEU, it is easily affirmable that such norm is one of the pillars of European competition law. It is composed by three different paragraphs, the first of which sets out a general prohibition on agreements[12], it also precludes agreements between undertakings[13], decisions by associations of undertakings[14] and concerted practices[15].
Those conducts set out in art. 101 of the TFEU are anti-competitive if they have a determine impact on trade between Member States and if they "*have as their object or effect the prevention, restriction or distortion of competition within the internal market*".[16]
By reading the rule it is easily understandable that, for the above-mentioned article to apply, not only it is necessary the actual and relevant alteration of competition,

[12] "*between independent market operators acting both at the same level of economy, usually actual or potential competitors, (horizontal agreements) and at different levels, often producers and distributors (horizontal agreements)*" – Lorenz Moritz, 'Key Concepts of Article 101 TFEU' [2013] An Introduction to EU Competition Law, Cambridge University Press, 62.
[13] There is no definition of "undertaking" given in the TFEU. The European Court of Justice has, however, construed this term widely. The European Court of Justice holds that the legal status, or the legal form of the entity in question, is not the issue for the purposes of EU competition law. What is at issue is whether or not the entity engages in commercial/economic activities and whether or not such activities are carried out for profit. In defining an "undertaking", therefore, the European Court of Justice concentrates on the activities or functions of the entity as opposed to its nature. To come within the scope of Art. 101(1) TFEU, there must be two or more undertakings involved. In some circumstances also a parent and subsidiary company belonging to the same corporate group would be treated, for the purposes of Art. 101(1) TFEU, as one undertaking.
[14] For instance, a non-binding recommendation which reduces competition among the undertaking's members of the association.
[15] The term "concerted practice" refers to collusion between undertakings which cannot be considered an agreement, e.g., the exchange of information among different companies *cf.* C-89-95 *A. Ahlstroem Osakeyhtioe, Helsinki et al. vs. Commission of the European Communities* [1988] EU:C:1988:447 (Wood Pulp).
[16] TFEU, art. 101(1).

but also the simple and potential, in a prognostic judgement, damaging impact of the anti-competitive conduct. Similarly, the awareness of the negative effect on competition is not necessary, since just the actual impact on the market is sufficient.
From this first analysis it is clear that for art. 101 of the TFEU to apply two preliminary conditions need to be satisfied: the presence of an agreement between undertakings and that the agreement has an effect on intra-Community trade.[17]
The conclusive part of para (1) mentions a non-exhaustive list of anti-competitive agreements,[18] this list is progressively extended by the case law of the CJEU.
According to the second paragraph of art. 101 of the TFEU, any agreement or decision prohibited pursuant to art. of the 101(1) shall be automatically void.[19]
Finally, the last paragraph of art. 101 of the TFEU prescribes that if four cumulative conditions are satisfied, and only when they are all fulfilled, the agreement, decision or concerted practice, can be justified and authorized. Such four cumulative, and non-exhaustive, conditions are that the agreement achieves a general interest's goal (i.e., improvement production, distribution, technical innovation), that consumers receive a "fair share" of the benefits, that the agreement causes "indispensable" restrictions of the competition and does not fully eliminate the competition in the market. If, and only if, all the above-mentioned conditions are satisfied, exemptions can be granted to behaviour that is caught by prohibition set out in art.101(1) of the TFEU.[20]

i. The broad definition of agreement under article 101 TFEU and the restrictions by object and by effect.

[17] intra-Community trade condition is not satisfied in Art. 101 of the TFEU when the market share of the undertakings involved in the agreement is below 5% and the turnover of the undertakings involved in the agreement is below 40 million euros.
[18] See TFEU, art. 101(1) "*(a) directly or indirectly fix purchase or selling prices or any other trading conditions; (b) limit or control production, markets, technical development, or investment; (c) share markets or sources of supply; (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.*".
[19] The agreement is irremediably and automatically void and, as has always been confirmed by the case law of the Court of Justice, can be detected, even *ex officio*, by any national judge *cf.* Case 37/79 *Anne Marty SA vs. Estée Lauder SA* [1980] EU:C:1980:190. If the agreement contains "severable" clauses, the nullity affects only such clauses *cf.* Case 56 and 58/64 *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community* [1966] EU:C:1966:41.
[20] The impact of art. 101 TFEU is constrained by the *De Minimis* Notice. Agreements, arrangements, and understandings between parties that may reduce competition in the EU are all prohibited in principle, but may be "exempted" if they are on the whole economically beneficial (this burden of operating this exemption system, and the attendant delay in reviewing agreements has resulted in the Commission enacting Block Exemptions).

For the purpose of the present analysis two concepts worth the attention: the broad definition of agreement and the distinction between restricions by object and restrictions by effect.

In EU competition law, the term "agreement" means a *consensus* between the parties to act in a certain manner, and, therefore, the concept of agreement under art. 101 of the TFEU is broader than the one under contract law and has always been broadly interpreted.

The second relevant issue, provided in art. 101 of the TFEU, is the distinction between restrictions by object and restrictions by effect.

In fact, art. 101(1) of the TFEU prohibits agreements which "*have as their object or effect the prevention, restriction or distortion of competition within the internal market*".[21]

A restriction by object occurs when an undertaking concludes an agreement with the intention to restrict competition. The majorities of the restrictions by object occur in horizontal agreements, like, for instance, a cartel fixing sale prices, quotas of production or exchanging information, but there are also some examples of restrictions by object in vertical agreements, for example the resale at price maintenance or the limitation imposed on the ability of the distributor to re-sell the goods purchased.

As restrictions by object are *per se* prohibited, there is no need of an assessment on the effects of the agreement in the competition market, since there are no *de facto* justifications under the above-mentioned para 3 of art. 101 of the TFEU.

In contrast, a restriction by effect, is identified as a broader category. In fact, it includes all the agreements that are considered restriction by object and that occurs when the undertakings envolved do not have the intention of restricting competition. Some cases of restrictions by effect in horizontal agreements are e.g., a joint venture or a decision of a standard setting organization.

Conversely to restrictions by object, restrictions by effect are often found in vertical agreements, e.g., in a selective distribution agreement, in an exclusive distribution agreement that limits the geographic area where the retailer can sell or in a franchising agreement.

[21] TFEU, art. 101(1).

For such latter hypothesis of restrictions, an assessment by the EU Commission, or the by a Non-Competition Authority[22], will be needed. Such assessment will take into consideration both the pro and the anti-competitive effects of the agreement and, therefore, it requires a case-by-case analysis.
A restriction by effect can only be justified when the competent authotiy verifies that all the conditions under art. 101(3) of the TFEU are fulfilled.

ii. The differences between Vertical Agreements and Horizontal Agreements.

Before entering the specific subject of the Selective Distribution, it is necessary to briefly describe what is considered to be a vertical agreement, which is the positive and negative effects it can create on competition and which are the steps of its analysis in order to be exempted from the application of art. 101 of the TFEU.

Unlike horizontal agreements, that involves undertakings operating at the same level of the production chain, like, for instance, agreements that fix prices or divide markets between directly competing firms, vertical agreements are settlments between undertakings which operate at the same economical level that, not only directly compete between each other, but also fundamentally cooperate and coordinate the same production activities.
A vertical agreement is defined by the VBER[23] as "*an agreement or a concerted practice entered into between two or more undertakings each of which operates, for the purpose of the agreement or concerted practice, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services*".[24]
A vertical distribution chain involves undertakings operating in different levels of production, for example, an agreement between a manufacturer and a retailer to sell products to the customers.
Therefore, the level of the production chain allows to differentiate vertical agreements from horizontal agreements, that are agreements between undertakings

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[22] Note that, in the 1980s, the enforcement of EU competition was accentrated in the European Court of Justice. With the issuing of the VBER a decentralized system was introduced and all European countries were asked to established a National Competition Authority which would have worked in parallel with the European Commission, afterwards also the "pre-notidication" system was abolished.
[23] Commission Regulation (EU) 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 [2010] OJ L 102 (VBER).
[24] VBER, art. 1(1), (a).

active at the same level of the production chain, for example, an agreement between two competitors acting in the same relevant market.

Moreover, taking into consideration the effects on the competition, vertical agreements are generally less harmful than horizontal agreements, since vertical agreements can not only have a negative effect on competition, but they also can create benefits to competition and generate many different pro-competitive effects and efficiencies.

In the application of European competition law, one of the firsts questions that arose was whether the prohibition of restrictive agreements *ex* art. 81 of the Treaty establishing the European Community also concerned the so-called vertical agreements. The question arose since such agreements, being stipulated between competing companies, were somehow capable of restricting competition, as horizontal agreements do and that, at most, if the conditions were met, they could have been subject to the provisions of art. 82 of the same Treaty, concerning the abuse of dominant position.

The NCAs, however, have taken a different view. In fact, the European Commission and the European Court of Justice have always interpreted Art. 81 of the Treaty establishing the European Community in an extensive manner, adhering to the doctrine of the "economic freedom", centered on the control of the conduct of market operators, with the consequence that, potentially, each and every agreement, by binding the conduct of the parties, could be considered as a restriction of competition.[25] One of the icebreaker sentences of the European Court of Justice, the so called *Consten and Grunding* case[26], has, in fact, ascertained that also vertical agreements fall under the prohibition of art. 101 of the TFEU.

Notwithstanding the above, according to the Commission's Guidelines[27], there are four negative effects from the practice of vertical agreements[28] and those can be resumed as follow: the foreclosure of the market, the reduction to intra-brand competition, the risk of collusion among producers and distributors and the restriction of parallel trade that hamper the EU internal market.[29]

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[25] Alan J. Riley 'Vertical Restraints: A revolution?' [1998] 19, 8 European Competition Law Review 483.

[26] C-56 and 58/64, *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH vs Commission of the European Economic Community* [1966] EU:C:1966:41 (*Consten and Grunding*)

[27] Euroepan Commission Guidelines on Vertical Restraints (Text with EEA relevance) [2010] OJ C 130/01 (Guidelines Restraints) (GVR)

[28] Guidelines Restraints, [100].

[29] *Ibid.*

Several arrangements of vertical agreements are more likely to have negative effects on competition. The practice of exclusive agreements, making the buyer purchase only one brand, is one of the examples.[30] Also, a vertical restraint agreed for branded goods tends to reduce the substitutability of the product with the consequence of a reduced elasticity of the demand and a possible increasing of the price.[31] If different vertical restraints are combined together the negative effect can aggravate, furthermore, the negative effect of vertical restraints can possibly be reinforced when several suppliers and their buyers are arranged in a similar trade way, leading to an accumulation of effects (the so-called cumulative effects).[32]

As mentioned, it is also important to recognise that vertical restraints may have positive effects, particularly by the promotion of non-price competition and the improvement quality of services.[33] The following nine positive aspects are the reason of the justification of many vertical restraints: first of all, they can solve the "free-rider problem",[34] non-compete type restraints can help to overcome this situation of free-riding; through vertical restriction it is possible to enter and open a new market[35]; the "certification free-rider issue", especially in sectors in which the retailers only stock quality products the manufacturer can temporarily justify the restriction, such as with exclusive or selective distribution; the specific "hold-up problem", in case know-how is provided to the retailer and the provider do not want it to be used by his competitors,[36] normally this would be justified and falls outside the scope of application of art. 101(1) of the TFEU;[37] the "vertical externality issue",[38] a vertical restrain can avoid the supplier and the retailer from harming each

[30] *Ibid* [103].
[31] *Ibid* [104].
[32] *Ibid* [105].
[33] *Ibid* [107].
[34] According to *ibid* para 107, (a), the "free-rider problem" can occur when one distributor free-rides on the promotion efforts of another distribution or when a supplier invests in promotion at the buyer's premises.
[35] According to *ibid* para 107, (b), the manufacturer that want to enter a new geographic market can persuade a local distributor to make the first investments providing territorial protection to the distributor so that he can recoup these investments by temporarily charging higher price.
[36] According to the VBER, art. 1(1), (g), "know-how" means a package of non-patented practical information, resulting from experience and testing by the supplier, which is secret, substantial and identified: in this context, "secret" means that the know-how is not generally known or easily accessible; "substantial" means that the know-how is significant and useful to the buyer for the use, sale or resale of the contract goods or services; "identified" means that the know-how is described in a sufficient comprehensive manner so as to make it possible to verify that it fulfils the criteria of secrecy and substantiality.
[37] Guidelines Restraints [107 (e)]
[38] Guidelines Restraints [107 (f)]

other, for example if there is a double marginalization problem;[39] the "economy of scale distribution",[40] a vertical restraint, such as selective distribution or quantity forcing with a minimum purchase requirement, can be used when the manufacturer wants to concentrate the resale of a product on a limited number of distributors and have a lower retail price for its products; the "capital market imperfections"[41], the exclusive vertical agreement can possibly guarantee more security to the capital owner when determining the quality of the borrower[42] and, lastly, "the uniformity and quality standardization", vertical restraints, such as selective distribution or franchising, can boost the attractiveness of a brand, and the sale of its products, with the imposition of measures of uniformity and quality standards on distributors.[43]

To sum up, the negative effects of vertical agreements can be offset by the possibility of vertical restraints, under certain circumstances, to help realising efficiencies and development of new markets. Indeed, there are different types of vertical agreements that can help solve different inefficiency problems.[44]

In fact, it is possible to individualize four different categories of such vertical agreements, which are herein summarized assuming that A is the manufacturer and B is the retailer or wholesaler.

First of all, there could be a single branding agreement, where B only sells goods manufactured by A; an exclusive distribution agreement, where B is the only authorized distributor by A within a geographic area or within a determined group of customers; a selective distribution agreement where B is selected by A on the basis of standard or qualitative criteria and the last category is the franchising agreement in which A provides to B goods, trademarks and know-how.

In practice, vertical agreements are characterized by a large measure of substitutability and there is no strict division between those four categories but, instead, they are often interconnected one with the other.

As anticipated, since vertical agreements generates both anti-competitive effects and efficiencies, they should be subject to an analysis that is to be done case-by-case.

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[39] i.e., when both parties are charging a higher price for the products leading to underproduction.
[40] Guidelines Restraints, [107 (g)].
[41] *Ibid*, [107 (h)].
[42] The opposite of this restraint is when the retailer provides the loan to the supplier with exclusive supply or quantity forcing agreements.
[43] Guidelines Restraints, [107 (i)]
[44] *Ibid* [109]

Considering that it can have an anti-competitive effect, and generates concerns under competition law, only in presence of a market power**.**

Such analysis is usually done on an effect-base, even if there also are some clauses in vertical agreements that can generate object restriction and are, therefore, *per se* anti-competitive.

Those restrictions can be geographic restraints, when a distributor cannot sell products outside a determinate area; price restraints, for instance the reselling at price maintenance or the imposition of a minimum or maximum resale price; another restriction by object is the limitation on sales modalities, like the ban on the internet sales by the distributors, or, lastly, the ban on parallel trades, when the distributor cannot export the products abroad.

In particular, the GVR sets out the principles for the assessment of vertical agreement under art. 101 of the TFEU, that prohibits those agreements which appreciably restrict or distort competition, whilst article 101(3) of the TFEU exempts those agreements which confer sufficient benefits to outweigh the anti-competitive effects.[45]

II. Vertical Agreements and their assessment under the Vertical Block Exemption Regulation: three steps of the framework's analysis.

There are three main steps of analysis in order to define if a vertical agreement can be exempted from the application of art. 101(1) of the TFEU.

To summarize the process of the assessment: for vertical agreements entered into force between undertakings in which the individual market is below 15%[46] there is a presumption of no effect on intra-community trade, because it does not have an appreciable effect on competition under art. 101(1) of the TFEU, therefore they are generally considered to fall outside the scoope of art. 101(1) of the TFEU.[47]

Conversely, if the market share, of at least one of the undertaking, is above 15%, it is necessary to move forward to the second step of the assessment and check if the requirenments under the VBER are fulfilled, then, the third and last step occurs if the regulation is not applicable to the vertical agreement and a case-by-case assessment under art. 101(3) of the TFEU shall be done.

[45] Guidelines Restraints [1-7].

[46] The threshold for vertical agreements is higher than the thresholds for horizontal agreements (below 5%) because vertical restraints are more likely to generate pro-competitive effects.

[47] Guidelines Restraints [1-7].

i. The 2014 *De Minimis* notice.

Of great relevance, within the regulatory framework subject of this study, is the European Commission's Notice on the agreements of minor importance which do not appreciably restrict competition under article 101(1) of the Treaty on the Functioning of the Europena Union – 2014/C 291/01 (2014 *De Minimis* Notice).

The 2014 De Minimis Notice was issued after the CJEU ruling in *Expedia* case[48], which the two main outcomes are, first, that the *De Minimis* Notice is binding only for the EU Commission, instead, NCAs may take into account the thresholds established in para. 7 of the *De Minimis* Notice but are not required to do so[49] and, second, that agreements which include object restrictions do not fall under the scope of the 2014 *De Minimis* rule.[50]

In order to deepen the scope of the regulation, with the 2014 *De Minimis* Notice, the European Commission confirmed that agreements between undertakings affecting trade between Member States are presumed not to appreciably restrict competition within the meaning of art. 101(1) of the TFEU when:

(a) the aggregate market share held by all the parties of the agreement does not exceed, in any of the relevant markets affected by the agreement (geographic and product markets), 10%, if the agreement is entered into between undertakings competing on any of the affected relevant markets, or

(b) the market share held by each of the parties of the agreement does not exceed 15%[51] on any of the relevant markets affected by the agreement, if the agreement is concluded between non-competing undertakings.

This presumption of legality (so-called "safe harbour") for agreemetns between undertakings which the European Commission considers to have a non-appreciable effects on competition does not apply to agreements (i) which have "*as their object toprevent, distort or restrict the competition within the internal market"*[52] or (ii) which contains fundamental restrictions or restrictions listed considered as hardcore

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48 Case C-226/11 *Expedia Inc. v Autorité de la concurrence and Others* [2012] EU:C:2012:795 (*Expedia*).
49 *Expedia*, para 31.
50 *Expedia*, para 37.
51 These thresholds are lowered to 5% if competition on the relevant market is limited by the cumulative effect of agreements relating to the sale of goods or services, implemented by several suppliers or distributors (cumulative foreclosure effect produced by parallel networks of agreements having similar effects on the market), whereas if it is difficult to determine whether the agreement is concluded between competitors or between non-competitors, the 10% threshold is applied.
52 TFEU, art 101 (1).

restrictions under the Block Exemption Regulation, as such fundamental restrictions are usually considered to constitute restrictions by object.

Therefore, the European Commission under the 2014 *De Minimis* Notice, adopts a different approach for "restrictions by effect" and "restrictions by object". The former, subject to the market thresholds set out in the mentioned communication of 2014, are presumed not to appreciably restrict competition within the meaning of art. 101(1) of the TFEU. The latter do not benefit from the "safe harbor" and are considered, *per se* and regardless of their practical effect, appreciable restrictions of competition, without the European Commission having to ascertain their actual anti-competitive effects.

The assessment of the effect of the agreement moves forward to the second step only if the mentioned conditions and percentages are not fulfilled.

ii. The Vertical Block Exemption Regulation No. 330/2010.

Entering the specifc analysis of the above mentioned VBER (*cf.* introduction), the regulation was adopted by the European Commission on June 1st, 2010, and it will remain in force until 2022. The VBER was delegated by the European Council and published together with the GVR, intended to remain in force for the same period of time. Such Guidelines represent the fundamental tool for the correct interpretation and application of the provisions of the VBER, since they contain definitions, instructions and clarifications necessary for the correct interpretation and application of the regulatory framework.

Previously, the framework for vertical agreements was regulated by Regulation (EC) No. 2790/99[53] which, by abandoning the formalism of the previous regulations, had begun acknowledging more clearly the needs of market operators, on the assumption that the so-called vertical restraints were subject to an anti-competitive effect only in certain cases, but could also represent a positive increase in the economic efficiency of the production or distribution chain.

[53] Commission Regulation (EC) No 2790/1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices (Text with EEA relevance) [1999] OJ L 336.

In this regard, see recitals (6)[54] and (7)[55] of Regulation (EC) No. 2790/99 (fully integrated by the new Regulation (EU) No. 330/2010).
Briefly, the Regulation (UE) N. 27790/99 has aleready provided on some conditions for the automatic exemptions of the vertical agreements if, for instance, the percentage of market share of the single supplier did not exceed the 30% of the relevant market in which the buyer purchased the goods or services object of the agreement. In the event of vertical agreements that exceded the threshold of 30%, the Regualtion (EU) n. 2790/99, provided however for the possibility of individual exemption after specific case-by-case assessements evaluing the concrete impact of the agreement on the competition.

Regulation (EU) No. 330/2010 amplifies and further develops the principles underlined in the previous Regulation (EU) no. 2790/99.
Among the main changes, the first concerns the so-called block exemption, which only applies where none of the parties involved in the vertical agreement has a market share of more than 30%.
Unlike what happened with Regulation (EU) no. 2790/99, therefore, the threshold of 30% no longer only applies to the supplier but also to the buyer. This change is justified in light of the expansion of the buyer's market power in the market sector of the distribution of consumer goods.
For the purpose of the assesement, we can state that, according to Art. 3 of the VBER, the exemption applies under the condition that there are at least two or more different relevant markets[56] in the vertical agreement and that their market share does not exceed 30%.[57]

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[54] "*vertical agreements [...] an improve economic efficiency within a chain of production or distribution by facilitating better coordination between the participating undertakings*".
[55] "*The likelihood that such efficiency-enhancing effects will outweigh any anti-competitive effects due to restrictions contained in vertical agreements depends on the degree of market power of the undertakings concerned and, therefore, on the extent to which those undertakings face competition from other suppliers of goods or services regarded by the buyer as interchangeable or substitutable for one another, by reason of the products' characteristics, their prices and their intended use".*
[56] 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 where it purchases the contract products.
[57] Guidelines Restraints, [88] – "*In order to calculate an undertaking's market share, it is necessary to determine the relevant market where that undertaking sells and purchases, respectively, the contract products. Accordingly, the relevant product market and the relevant geographic market must be defined. The relevant product market comprises any goods or services which are regarded by the buyers as interchangeable, by reason of their characteristics, prices and intended use. The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of relevant goods or services, in which the conditions of competition are sufficiently homogeneous, and which can be distinguished from neighbouring geographic areas because, in particular, conditions of competition are appreciably different in those areas*"

Those two cumulative conditions allow and ensure balance between the market power of the manufacturer and the distributor and, if they apply, there is a presumption that the vertical agreement is exempted from the application of art. 101(3) of the TFEU.
Going trough, the text of the regulation, another innovative element, with respect to the previous regulations, concerns the inclusion of online sales, in line with the ever-increasing evolution of this market sector.
Continuing with the comparison with the past regulations, in the new VBER there is the exemption of restrictions on the so-called active sales, defined in para (51) of the GVR.[58]
Likewise, Regulation (EU) No. 330/2010 confirms the prohibition of the so-called passive sales restrictions, also defined in para (51) of the new Guidelines.[59]
The GVR of Regulation (EU) No. 330/2010 also clarifies that the use of the internet for the purpose of selling products must be allowed, without restriction, to any distributor, since it is unquestionably an indispensable channel between distributor and client.
Moreover, in relation to online sales, although, generally speaking, passive sales are not subject to restrictions, specific hypotheses are identified in which these sales, such as, for instance, online advertising visible in certain territories not entrusted by the distributor, can be considered as active sales in the territory or to the exclusive customers of other distributors that may be subject to restrictions pursuant to Regulation (EU) No. 330/2010.

Focusing on the assessment, object of the present paragraphs, it is valuable to underline that the above-mentioned presumption does not apply when a vertical agreement includes the “hardcore clauses”.[60]

[58] See Guidelines Restraints, [51] *“«Active» sales mean actively approaching individual customers by for instance direct mail, including the sending of unsolicited e-mails, or visits; or actively approaching a specific customer group or customers in a specific territory through advertisement in media, on the internet or other promotions specifically targeted at that customer group or targeted at customers in that territory. Advertisement or promotion that is only attractive for the buyer if it (also) reaches a specific group of customers or customers in a specific territory, is considered active selling to that customer group or customers in that territory”.*
[59] *Ibid* “*«Passive» sales mean responding to unsolicited requests from individual customers including delivery of goods or services to such customers. General advertising or promotion 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 one's own territory, are passive sales. General advertising or promotion is considered a reasonable way to reach such customers if it would be attractive for the buyer to undertake these investments also if they would not reach customers in other distributors' (exclusive) territories or customer group”.*
[60] VBER, art. 4 and art. 5.

Deepen the topic of the hardcore clauses, and they can be categorized in two main groups.
There are the so-called black clauses[61], listed in art. 4 of the VBER. Including such hardcore restrictions in an agreement give rise to the presumption that the agreement falls within art. 101(1) of the TFEU, it is unlikely to fulfil the conditions of art. 101(3) and, therefore the VBER does not apply to the entire vertical agreement that falls outside of its scope.[62]
However, the pro-competitive effects can still be demonstrated by the undertaking with an individual analysis of the agreement under art. 101 TFEU.
By way of example, a black clause's restriction is the resale at price maintenance, that is *per se* prohibited. However, the VBER also recognizes that such kind of restriction can also produce efficiencies that can be evalued in order to assess an individual exemption of the single agreement. Such an approach can help distributors to maximize the sales, making the product's launch more successful, which also benefits consumers. Similarly, resale price maintenance may be necessary in the case of franchising, in order to ensure low prices for consumers during a promotional campaign.
On the other hand, there are the so-called white clauses,[63] provided in art. 5 of the VBER, according to which certain obligations are excluded from the application of the VBER, but it continues to apply to the remaining part of the vertical agreement.[64]
This means that the entire vertical agreement can still be exempted from the application of the VBER, if the incompatible clause is removed.

Nevertheless, it is necessary to underline that, in line with the past regulation, the VBER provides that vertical agreements that do not fulfil with the requirements which make the agreements automatically authorized (the percentage of market shares of each party of the agreement lower than 30% and no hardcore clauses are

[61] The list of black hardcore clauses can be divided between the restriction on price restraints in Art. 4(a) VBER, for instance the provision of a minimum retail price or the resale price maintenance, and the restraints about the geographic area in Art. 4(b-e) VBER, for instance when a manufacturer limits a geographic area or a group of customers where the distributor can re-sell goods. Regarding geographical restraints, it is important to underline that, as a general rule, vertical agreements cannot prohibit passive sales to the specific territories or customer groups, if they are prohibited this prohibition falls under the black hardcore clause, whilst active sales can be restricted.
[62] Guidelines Restraints, [47].
[63] VBER, art. 5.
[64] Guideline Restraints, [65].

present in the agreement) can still be exempted after an individual assessment under art. 101(3) of the TFEU.

iii. Article 101(3) of the TFEU and the 2010 EU Commission Guidelines on Vertical Restraints.

Finally, the last step of the analysis concerns the assessment under art. 101(3) of the TFEU for vertical agreements which do not benefit from the Block Exemption Regulation. Those agreements are, first of all, vertical agreements that contain black clauses, that are unlikely to be justified under art. 101(3) of the TFEU, as black clauses are considered to be object restrictions.[65] Secondly, the vertical agreements which exceed the market share thresholds of 30%.

In such cases an effect-based analysis of the possible justifications under art. 101(3) of the TFEU will hold since the provision allows to exempt certain types of agreements, abstractly distorting competition, due to the positive effects they might have in the production process or for their technical/economic progress.

For ease of reference, the text of the provision under examination is given below:

"(...) The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- *any agreement or category of agreements between undertakings,*
- *any decision or category of decisions by associations of undertakings,*
- *any concerted practice or category of concerted practices,*

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question. (...)".[66]

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[65] See *ibid* para 47, "*In case the undertakings substantiate that likely efficiencies result from includingthe hardcore restriction in the agreement and that in general all the conditions of Article 101(3) are fulfilled this will require the Commission to effectively assess the likely negative impact on competition before making the ultimate assessment of whether the condition of Art. 101(3) are fulfilled*".

[66] TFEU, art 101(3)

The literal wording of the above article and the practice of the comunitarian institutions makes it possible to distinguish between individual exemptions and block exemptions.
In one hand, individual exemptions concern single agreements which fall under the prohibition of art. 101(1) of the TFEU but meet the conditions of para 3 of the same provision. On the other hand, the so-called block exemptions, concern categories of agreements, understandings or concerted business practices.

Agreements and practices, as referred to in art. 101(1) of the TFEU, which satisfy the conditions set out in para 3 of the same article, are not prohibited without a prior decision to that effect. For what concerns the scope of application, the exemption of art. 101(3) of the TFEU applies, *inter alia*, to vertical agreements concluded between an association of undertakings and its members, provided that all its members are retailers of goods and that none of the individual members of the association, together with their associated undertakings, has a total annual turnover exceeding 50 million euro.

III. The Selective Distribution system and the "Metro Criteria".

Now that is clear which is the purpose of the VBER: covering purchase and distribution agreement based on the definition of vertical agreement in art. 1(1) of the TFEU, it is important to shift the attention on the specific vertical restraint, exempted under the VBER, of the selective distribution.
The selective distribution system allows the brand owner of a certain product to select certain criteria under which they can choose which distributor will have the rights to resell its product and how and which dealer to refuse as they do not comply with the set criteria.
This type of distribution system is particularly popular in the luxury sector, as it allows brand owners to manage the prestige of their brand image and price level of the products. Moreover, selective distribution system is extremely flexible, compare to exclusive distribution system or franchising, because it enables the supplier to select distributors with quantitative or qualitative criteria that allows to ensure the commercialization of the luxury product or service under conditions which benefits the prestige.

Even if the European Commission views advantages in the selective distribution system, like the removal of obstacles in competition when a new manufacturer enters a market, the possibility to create a strong brand image or the fact that selective distribution can help in solving the "free-rider" problem by forcing all authorized retailers to invest in similar marketing,[67] the increase of the online retailers cannot be overridden in suche context, as it is becoming, everyday more, a daily used distribution channel.[68]

In fact, the selective distribution has moved from having a physical retail store dimension to a more complex choice of a private online shop and independent third-party online platforms channels. This growth of the online market has created both enormous opportunities alongside great challenges from a competition law's perspective.[69]

According to this situation, different kinds of marketplace's restrictions arose, from absolute bans to restriction on selling in marketplaces that do not fulfil certain quality criteria.[70] For that reason, the question on whether contractual restrictions, limiting the ability of retailers to sell via online marketplaces, are compatible with EU competition rules, has attracted significant attention.[71]

The dispute on this topic is unavoidable, since many different interests are involved between suppliers and retailers but also consumers,[72] for this reason it has been said that Internet sales have "*shaken selective distribution out of its comfort zone*".[73]

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[67] Guidelines Restraints, [107(a) (i)] [185].

[68] European Commission, 'Report from the Commission to the Council and the European Parliament - Final Report on the E-Commerce Sector Inquiry' [2017] 229 final <https://ec.europa.eu/competition/antitrust/sector_inquiry_final_report_en.pdf> accessed on July 21st, 2021, the Report confirms that the growth of e-commerce over the last decade had a significant impact on companies' distribution strategies and customer behaviour.

[69] Stefan Wartinger and Lukas Solek, 'Restrictions of Third-Party Platforms within Selective Distribution Systems' [2016] 39, 2 World Competition 291, 291.

[70] European Commission, Competition Directorate - General of the European Commission, "EU competition rules and marketplace bans: Where do we stand after the Coty judgment?" [2018] 1 Competition Policy brief 1.

[71] *Ibid.*

[72] Giuseppe Colangelo and Valerio Torti, 'Selective Distribution and Online Marketplace Restrictions under EU Competition Rules after Coty Prestige' [2018] 14 1 European Competition Journal 81, 81

[73] Andrés Font Galzara and Eryk Lucas Dziadykiewicz and Alejandro Guerrero Perez, 'Selective Distribution and E-Commerce: An Overview of EU and National Case Law' [2015] No. 63958 e-Competition <https://www.concurrences.com/en/bulletin/special-issues/selective-distribution-en/selective-distribution-and-e-commerce-an-overview-of-eu-and-national-case-law-en> accessed on July 21st, 2021.

Obviously, a supplier can distribute its products in many different ways, but, according to the selective distribution system, suppliers select their distributor on the basis of certain qualitative criteria.
In particular, there are two selective distribution systems, namely, the "purely qualitative selective distribution" and the "quantitative selective distribution".
According to the first one, the supplier selects the retailer on the basis of objective criteria related to the products and distributors that, in return, agree to supply only to final consumers, or other approved distributors, within the selective distribution network.
The second distribution system is the "quantitative selective distribution"[74] and it directly restricts the number of distributors, on a specific territory, by the supplier and sets the minimum or maximum resale price, without any objective criteria.
In general, both selective distribution systems are considered to be restrictions of competition by object, unless they are objectively justified.

There are three cumulative criteria, that have been established by the CJEU in the *Metro* case[75], for an agreement to be recognized as a purely qualitative selective distribution and, therefore, to be objectively justified because compatible with art. 101(1) of the TFEU.
The criteria are[76]:

1. The nature of the products must justify any restriction put by the supplier to the type of retailer;
2. The objective qualitative criteria by the supplier to choose the retailer are without any discrimination and are laid down uniformly to all potential retailers;
3. The restriction does not go beyond what is necessary to protect the quality of the product.

If such objective justifications are not present, the selective distribution system may benefit from the block exemption under the VBER[77] and, as widely explained above,

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[74] Guidelines Restraints [175].
[75] Case 26-76 *Metro SB-Großmärkte GmbH & Co. KG v Commission of the European Communities* [1977] EU:C:1977:167 (Metro).
[76] Case C-439/09, *Pierre Fabre Dermo-Cométique SAS vs Autorité de la concurrence et al.* [2011] EU:C:2011:649 [41] (*Pierre Fabre*); going back to principles developed in *Metro* Case, [20]; *cf.* also Giorgio Monti, 'Restrains on Selective Distribution Agreements' [2013] 36, 4 W Comp 491, 494.
[77] Provided that both supplier's and distributor's market shares do not exceed 30% and the agreement does not contain any hardcore restrictions.

if it falls outside the scope of the VBER, the system must be individually assessed under article 101(3) of the TFEU.

In this respect, the question that arises is whether, and to what extent, such a general and absolute ban, imposed on authorized distributors on a selective distributors network, on selling agreed goods to end users *via* internet constitute a "hardcore" restriction in the meaning of the VBER. Such question has mainly been interpreted by the CJEU in the two leading cases: *Pierre Fabre* and *Coty*.

i. Two leading cases of the Europena Court of Justice:

i.i. ***Pierre Fabre*** **Case – CJEU.**

The first judgment to answer the question on the criteria that need to be fulfilled for online sales ban not to be considered as a restriction on competition, has been the judgment of the European Court of Justice *Pierre Fabre*.
The case concerned a contractual restriction included in a selective distribution agreement between the French cosmetics manufacturer *Pierre Fabre* and the *Ministre de l'Economie*, *de l'Industrie et de l'Emploi*. *Pierre Fabre*'s cosmetic and personal care products, under its standard distribution agreement, must exclusively be sold in pharmacies and not in different kinds of shops, neither on online platforms. This because, according to *Pierre Fabre*'s view, only qualified pharmacists could provide a better customer service in order to sell its luxuourus products. The general conditions of the distribution and sale agreement between the parties excluded *de facto* all forms of selling by internet. The French NCA in 2006 opened an *ex officio* investigation of practices in the distribution sector of cosmetics and personal care products and Pierre Fabre's distribution agreement was considered in breach of art. 101(1) of the TFEU inasmuch as *Pierre Fabre* had market a share below 30%, the Block Exemption Regulation 2790/1999 was not applicable because the prohibition of sales on internet was considered by the French NCA as a hardcore clause.
This consideration was based on the fact that even if Regulation 2790/1999 did not mention internet sales, the agreement was considered to implement a hardcore clause because of the prohibition of passive sales and, moreover, the conditions provided in art. 101(3) of the TFEU were also not satisfied.
The French NCA appeales to the Paris Court of Appeals, which asked for preliminary ruling to the Court of Justice of the European Union.

The CJEU ruled, first of all, that the absolute and general ban on selling the contract goods to end-users via internet, imposed on authorized distributors on the context of a selective distribution network, is considered as a restriction by object under art. 81(1) of the Treaty on the functioning of the European Union.[78]

Moreover, that such restriction, cannot benefit from the Block Exemption Regulation n° 2790/1999, as such a ban operates as a limitation on active and passive sales pursuant to article 4(c) of the same regulation.[79]

The third and last consideration of the CJEU was that the ban provided in the *Pierre Fabre* selective distribution agreement might benefit from an individual exemption pursuant to art. 81(3) of the Treaty on the functioning of European Union, provided that the four cumulative conditions laid down in that provision are met.[80] Therefore, according to the third step of the mentioned assessment, national courts have to assess the application conditions of art. 101(3) of the TFEU.

The CJEU hereby acknowledges that: "*there are legitimate requirements, such as the maintenance of a specialist trade capable of providing specific services as regards high–quality and hightechnology products, which may justify a reduction of price competition in favor of competition relating to factors other than price*",[81] the maintenance of a prestigious image is not considered as sufficient motivation to cause such a strong restriction of competition.

The above-mentioned conclusions of the *Pierre Fabre* Judgment have been ruled by the CJEU on the Block Exemption Regulation n. 2790/1999 but are also valid for Regulation No. 330/2010, because the judgment was finally decided when the new block exemption regulation was already in force.

The *Pierre Fabre* case is considered a leading case inasmuch as its relevance lays in the clarification given by the CJEU on the application of Regulation No. 330/2010 to e-commerce, in a twofold sense. The first outcome is that internet sales are to be considered as passive sales, therefore a manufacturer cannot restrict the ability of the retailer to re-sale the goods online. Secondly, and consequently, the CJEU considered limitations on internet sales as an object restriction.

[78] Currently, TFEU, art. 101(1).

[79] Opinion of Advocate General Mazak on Case C-439/09 *Pierre Fabre Dermo-Cosmétique SAS vs Président de l'Autorité de la concurrence and Ministre de l'Economie, de l'Industrie et de l'Emploi* [2011] EU:C:2011:113 [62].

[80] *Pierre Fabre*, [59].

[81] *Pierre Fabre*, [40].

As it is easy and understandable, in the ruling under examination, the Court took a significantly rigid and restrictive position and, also for this reason, the ruling has been object of many negative criticisms[82] and invitations to review the approach taken.[83]

That being stated, in the legal debate that followed this ruling, it has been recalled that: "*The key to reconciling these apparently diverging interpretations perhaps lies in the fact that the CJEU in Pierre Fabre was primarily condemning an absolute and general ban on online sales. Such an unconditional ban would probably be unnecessary, as there are less draconian restrictions to ensure the quality of luxury products while preserving the opportunity to distribute through the online channel.*"[84]

Therefore, the ruling, must be interpreted and contextualized in order to identify its actual scope.

i.ii. *Coty* case – CJEU.

Of outmost importance, for the established principles and the legal arguments discussed, is the well-known and so-called *Coty* judgment of the CJEU.

As commenters were to clarify, the *Coty* judgment marks the turning point in the ongoing debate between the European Commission against some Member State courts and competition authorities on the treatment of third-party platform bans.[85] These national courts and NCAs considered limitations on the use of third-party platforms an appreciable restriction of competition. However, the European Court of Justice does not follow this line of reasoning and adopts the approach proposed by the European Commission.

In a nutshell, the judgment decided with the above mentioned ruling originates from a restrictive contractual clause that, in 2012, *Coty Germany GmbH*, a German company that markets luxury cosmetic products, had included in its selective distribution agreements. Specifically, in order to preserve the luxury image

[82] Louis Vogel, 'EU Competition Law Applicable to Distribution Agreements: Review of 2011 and Outlook for 2012' [2012] 3 Journal of European Competition Law & Practice 3, 273.

[83] Anne C. Witt, 'Restrictions on the use of third-party platforms in selective distribution agreements for luxury goods' [2016] 12, 2-3 ECJ 435, 461.

[84] Giuseppe Colangelo and Valerio Torti, 'Selective Distribution and Online Marketplace Restrictions under EU Competition Rules after Coty Prestige' [2018] 14 1 ECJ 81, 94.

[85] Frank Wijckmans, 'Coty Germany GmbH v Parfümerie Akzente GmbH: Possibility in Selective Distribution System to Ban Sales via Third-Party Platforms' [2018] 9, 6 JECL & Pract 373.

associated with the brand, this contractual clause prohibited authorized dealers from selling the contractual products on third party online platforms, such as Amazon or E-bay.

Parfumerie Akzente GmbH, the German licensee of *Coty Germany GmbH*, had refused to comply with this request, considering it incompatible with Art.101(1) of the TFEU.

To begin with, consisntent with the concessionaire's assumption, this clause was deemed illegitimate by the *Landgericht Frnakfurt am Main*, which, in its ruling, referred to the precedent of the CJEU in the *Pierre Fabre* case . Having appealed the decision by *Coty Germany GmbH*, the matter was referred by the *Oberlandesgericht Frankfurt am Main* to the European Court of Justice, with the following preliminary rulings:

1) the consistency of art.101(1) of the TFEU with a selective distribution system aimed at preserving the image of prestige and luxury of the products covered by the distribution agreement;

2) the compatibility with art. 101(1) of the TFEU of a prohibition, imposed by a manufacturer on its authorised distributors in a selective distribution system, on selling the products on the internet through third party e-commerce's platforms, that are distinct from those of the manufacturer or of the authorized distributor;

3) whether such prohibition, without an assessment of the specific case, should or should not constitute a restriction by object under art. 101 of the TFEU or a hardcore restriction under the VBER.

The European Court of Justice, aligning itself with the conclusions presented to it by Advocate General Wahl on July 26th, 2017, ruled on the legitimacy of this clause, establishing that the prohibition imposed did not constitute a restriction of customers within the meaning of art. 4 letter (b) of the VBER nor a restriction of passive sales to end users, within the meaning of art. 4 letter (c) of the same regulation.

All this, moreover, in perfect soherence with what has been established by the European Commission, according to which "*where the distributor's website is hosted by a third party platform, the supplier may require that customers do not enter the distributor's website through a site bearing the name or logo of the third party platform*".[86]

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[86] Guidelines Restraints [54].

Specifically, the judgment in question has established the conformability of selective distribution systems for luxury products with the provisions of art. 101 of the TFEU, on condition that the choice of dealers takes place according to objective criteria of a qualitative nature, established indiscriminately for all potential dealers and applied in a non-discriminatory manner, given that the criteria defined do not go beyond what is necessary.
Likewise, it was found to comply with the general prohibition imposed on members of a selective distribution system of luxury products from using online sales platforms for internet sales, in the event that said prohibition aims to safeguard the luxury image of these products is established indiscriminately and applied in a non-discriminatory manner and is proportionate to the objective pursued.
The CJEU, in the judgment under examination, once established the above mentioned principles have, therefore, referred the decision back to the national judge.

The importance of this pronouncement has been highlighted in the debate among legal practitioners, both before and after its publication.[87]
The underlying idea is that the CJEU, moving from a concept of "luxury", not so much material but rather conceptual, wanted to enhance the vitality of a constantly evolving market, where choices like those adopted by *Coty Germany GmbH*, due to the specific characteristics and prestige of the products marketed, in addition to protecting the brand, provide consumers with a clear element of distinction compared to similar, but less valuable, products.[88]
Indeed, the judgment in question, as correctly highlighted by critics, clarified that:
"*the quality of [luxury] goods is not just the result of their material characteristics, but also of the allure and prestigious image which bestow on them an aura of luxury, that that aura is essential in that it enables consumers to distinguish themfromsimilar goods and, therefore, that an impairment to that aura of luxury is likely to affect the actual quality of those goods*".[89]

[87] Serge Clerckx *et a*l., 'CJEU Issues Long-Awaited *Coty* Decision on Luxury Goods Supplier's Online Platform Ban' [2018] IP Litigation 8.
[88] Adrian Magnus and Emmanuelle van de Broucke, 'The Coty Case – The CJEU rules in favour of selective distribution networks against third-party online platforms' [2019] https://www.dentons.com/en/insights/articles/2019/june/21/coty-case-cjeu-rules-in-favour-of-selective-distribution-networks, accessed on July 21st, 2021.
[89] Francesco Carloni *et al*. 'Vertical Agreements in the Luxury Sector' [2021] 12, 1 JECL & Pract 56, 56.

The key points of the decision under examination, which are reported below, will become indispensable elements of evaluation of all subsequent case law:

- *Coty* confirms that selective distribution is a usefull and pro-competitive instrument for the protection of the investments' chain, necessary to preserve a strong brand image;[90]
- Third-party platforms are an important back door into selective distribution systems which undermine the principles underlying this method of distribution, a ban on sales through third-party platforms is an adequate response to the threat these platforms can pose;[91]
- Where the VBER applies, there is no strong differentiation between the luxury *vs.* non-luxury, above the threshold thirdparty platform bans should not constitute by object restriction for goods that relies on a strong brand image.[92]

Lastly, as was correctly pointed out in the legal debate following the *Coty* judgment, while the decision was welcomed with great satisfaction by the producers of luxury goods, it has been less appreciated by the companies operating in online marketplaces.[93]

As a matter of fact, the ruling in question appears, as well as legally correct, appropriate in balancing the conflicting interests, considering the disruptive mutation that the Internet has generated in the market, which writers have not hesitated to define: "*The biggest revolution for retail trade over the past two decades has been the discovery and establishment of the internet as a business tool"*.[94]

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[90] Denis Waelbroeck and Zachariah Davies '*Coty*, Clarifying Competition Law in the Wake of *Pierre Fabre*' [2018] 9, 7 JECL & Pract 431, 431.
[91] *Ibid*, 431.
[92] *Ibid*.
[93] Yves Botteman and Daniel Barrio 'From *Pierre Fabre* to *Coty* and Beyond: How Far Can Suppliers Ban Online Sales?' [2019] 10, 9 Journal of Europena Competition Law & Practice 519, 524.
[94] Maria José Schmidt-Kessen 'Selective Distribution Systems in EU Competition and EU Trademark Law: Resolving the Tension' [2018] 9, 5 JECL & Pract 304.

Chapter II

The principle of exhaustion of trademarks and the Selective Distribution system

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SUMMARY: I. Principle of exhaustion: the *Silhouette* Case – CJEU. – II. Two Italian rulings: – i. *Nashi-Nashi Argan* Case – Court of Milan. – ii. *Chantecler* Case – Court of Milan.

I. Principle of exhaustion: the *Silhouette* Case – CJEU.[95]

The selective distribution system not only concerns competition law but also envolves IP law and, in particular, trademark law.

In fact, one of the main limits of trademark's protection is the exhaustion principle, a very important principle which allows people on the market to resale original goods without interfering the rights of the trademark's owner, that shall only have the right to control the first sale of the product.

Once the trademark owner firstly placed the product on the market, once it did control it, its rights are exhausted and then, the resale of original goods is allowed.

At a national level, asking each and every retailer to have the trademark owner's consent, in order to be commercially allowed of selling a branded good it is unlikely to be implemented. However, what trademark owners do not like is if this practice occurs in an international context, since in an international selective distribution system, a trademark's owner wants to previously set a price according to the different relevant markets in which the product is offered.

As briefly stated, the principle depict that original goods which have been put on the market, either by the trademark's owner itself or trought its consent, can be freely sold since the right of the trademark's owner is exhausted, otherwhise, the commercial use of the branded product would be exclusively for the trademark's owner.[96]

That principle falls into what are known as the limitations to trademark protection, enacted in order to provide free actions, like referential use, parody or exhaustion.

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[95] Case C-355/96 *Silhouette International Gmbh v Co KG v Hartlauer Handelsgesellschaft mbH* [1998] E.C.R. 1998, I-676 (*Silhouette*).

[96] Maria José Schmidt-Kessen 'Selective Distribution Systems in EU Competition and EU Trademark Law: Resolving the Tension' [2018] 9, 5 JECL & Pract 304, 313.

The above principle of exhaustion of the rights conferred by an european trademark is statued under art. 15(1) of the European Trademark Directive, according to which "*An EU trade mark shall not entitle the proprietor to prohibit its use in relation to goods which have been put on the market in the European Economic Area under that trade mark by the proprietor or with his consent"*.[97]

Since the provision concerns goods that have been placed within the European Union or within the European Economic Area, and not outside, the question that arise is if the principle of exhaustion applies internationally or locally.
The CJEU in the *Silhouette* case answered the above-mentioned question on whether the territorial requirement is mandatory or if every EU Member State is free to choose to provide exhaustion if the product was first placed outside the EU, considering that very often markets outside the EU have lower market's prices than inside the EU.
The case concerned *Silhoutte*, a manufacturer of spectacle frames registered in Austria, and in many other countries, that sold to a firm called *Union Trading* under the strict instruction to sell the frames only in Bulgaria (at the time Bulgaria was not an EU Member State). However, *Hartlauer*, a low-price Austrian retailer, acquired the goods and reimported them for sale in Austria.
In this particular case it was questioned whether EU trademark law obliges Austria to prohibit this resell, since the glasses firstly came from outside the EU, or whether Austria was free to choose in which market could sell the branded products.
The ruling of the CJEU has been that the exhaustion free movement only applies within the EU, meaning that there is a kind of right for trademark owners in a selective distribution system of applying different prices outside the EU, usually lower prices than inside the European market, and then stopping the re-importation of goods.

In brief, the relevance of the ruling lays in the fact that EU Member States cannot decide on their own whether to apply the exhaustion principle on products that are put on the market for the first time inside or outside the EEA because not every kind of good can be freely resold.[98] Goods that come from outside the EU are not exhausted, instead, goods that have been placed for the first time within the EU or EEA market are exhausted.

[97] Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trademarks (Text with EEA relevance) [2015] *OJ L 336,* art. 15(1) (EU Trademark Directive).

[98] *Silhouette* case.

On this matter, the CJEU states that the existence of a selective distribution agreement is one of the “legitimate reasons” which excludes the application of the exhaustion doctrine of the trademark after goods have been put on the market.[99]
In the specifc case of the luxury sector, what is relevant for the exclusion of the application of the exhaustive doctrine is the confusion that the connection between the unauthorized reseller and the trademark’s owner generates. This link might jeopardize the aura of luxury and the image of prestige that the trademark’s owner intends to protect by choosing a selective distribution system.

II. Two italian rulings:

i. *Nashi-Nashi Argan* Case – Court of Milan.

Another important judgment on the subject of selective distribution is the *Nashi-Nashi Argan* case[100], rendered by the Specialized Business Section of the Court of Milan.
The provision under examination concerns a precautionary procedure instituted by the company *Landoll S.r.l.*, owner of the brands *Nashi* and *Nashi Argan*, producer of luxury professional cosmetics, marketed through selective distribution, only through higly specialized and trained personnel.
The action was brought against a retailer, *MECS S.r.l.*, extraneous to the distribution network of the plaintiff, which sold *Nashi* and *Nashi Argan* branded products on Amazon platform and on its own web site, claiming that this was perfectly lawful, in consideration of the principle of exhaustion of trademark rights, since such products had been purchased from authorized retailers and the contested initiative was not such as to cause any damage to the manufacturing company.
The Court of Milan, however, entirely disregarded the respondent's approach.
After acknowledging that the plaintiff had demonstrated the renown of its trademarks and products, as well as the fact that they were part of a prestigious and luxury image range, referring to the well-known *Coty* judgment, acknowledged the legitimacy of the selective distribution of *Nashi* and *Nashi Argan* branded products on the

[99] EU Trademark Directive, art. 15.
[100] Court of Milan Specialized Business Section R.G. 44211/2018 *Landoll S.r.l.vs MECS S.r.l.* [2018] (*Nashi-Nashi Argan*).

assumption that this distribution system, as per the text of the judgment, "*appears to be aimed also at guaranteeing, through the ascertained professional preparation of the authorized subjects - or through an adequate training and specialization activity - the appropriate use of the products in relation to the needs of the final clientele, thus contributing also under this profile to the need to safeguard the image and prestige of the product"*[101] furthermore*, "the qualitative criteria prepared and used by the plaintiff in the selection of authorized parties are entirely consistent with the intention of safeguarding the luxury image of the products in question, are established without distinction and applied in a non-discriminatory manner and are proportionate to the objective pursued".*[102]

The Court of Milan, moreover, has coherently recognized that the conduct of the respondent prejudiced the image of luxury of the *Nashi* and *Nashi Argan* branded products, motivating this conviction as "*the ways in which the respondent presents the products in question to the public both on e-commerce platforms and on its website, which manifest in their presentation the flat assimilation to any generic product of the sector even of lower quality. In addition, the respondent does not in any way guarantee specific professionalism in the use of such products".*[103]
Precisely on this basis, the Court of Milan ruled in the order in question: "*that the offer for sale of such products by the respondent in the manner described cannot be considered legitimately carried out, since the principle of the exhaustion of the trademark owner's rights following the first placement on the market does not apply in this case, and that therefore such conduct constitutes an infringement of the appellant's rights to its trademarks pursuant to art. art. 20, lett. a) c.p.i".*[104]

It is easy to understand how the decision in question is clearly in line with the so-called *Coty* precedent, not only because of the express reference to this ruling in the motivations of the judgment, but also due to the way in which the Court of Milan assessed the concrete case, underlying the same principles.
In this specific case, the proof that the products represent were prestigious and luxurious represented the first and inevitable logical step of the judge's reasoning,

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[101] *Nashi-Nashi Argan*, [3].
[102] *Ibid.*
[103] *Nashi-Nashi Argan*, [4].
[104] *Nashi-Nashi Argan*, [4].

which, after having proven this assumption, considered the request of the company owning the trademarks as legitimate and the conduct of the respondent as prejudicial

ii. *Chantecler* Case – Court of Milan.

In order to understand how the measures just examined are part of a jurisprudential debate that is anything but static, it is worth recalling and examining the judicial precedent *Chantecler* case[105] represented by the order of the Court of Milan, Specialized Section on Corporate Matters.

The procedural steps of the case are briefly summarised here below:
In December 2015, the company *Chantecler S.p.A.* had filed a precautionary proceeding against the company *Gens Aurea S.p.A.*, requesting the seizure, injunction and withdrawal from the market of products bearing the trademark "CHANTECLER", owned by the plaintiff.
In support of the precautionary questions, *Chantecler S.p.A.* claim that it carried out goldsmithing activities, both in Italy and abroad, as well as through a distribution channel of 135 authorized stores and that the decision to use a special network of dealers was based on the desire to control the sales methods, the image of its product and the prices applied to consumers.
On November 30th, 2015, the plaintiff had discovered that the defendant company, *Gens Aurea S.p.A.*, was selling some of the *Chantecler*'s products, in violation of the plaintiff's exclusive distribution network and its industrial property rights, in its showroom with the "LUXURY ZONE" sign, located within the "*La Reggia Designer Outlet*" shopping center in Marcianise. In particular, it had ascertained that some product of a speficic *Chantecler*'s collection, were sold at discounted prices compared to those authorized to its distributors.
The company *Gens Aurea S.p.A.* opposed the requests of the other party, asking for the rejection of the appeal and stating that: it carried out retail sales of jewellery articles, among which there were also products with the "CHANTECLER" trademark. In particular, it managed several outlet stores in Italy in which it marketed jewellery products of previous collections relating to well-known trademarks. However, the applicant had not proved the existence of selective distribution

[105] Court of Milan Specialized Section on Corporate Matters R.G. 3671/2016 *Chantecler S.p.A. vs Gens Aurea S.p.A.* [2016].

agreements with the licensees and, for the respondaent, the commercialization of said products by was lawful because of the exhaustion of all exclusive rights of the trademark owner and, in any case, the marketing Chantecler branded products did not damage the image of the trademark in any manner.

By interim judgment of January 11th, 2016, accepting the injunction applications, the Court of Milan had prohibited *Gens Aurea S.p.A.* from using the *Chantecler*'s trademark and from manufacturing and commercializing *Chantecler*'s branded products, also ordering their confiscation.

At that point, *Gens Aurea S.p.A.*, brought a complaint against the order of January 11th, 2016, which was annulled and reformed to the detriment of *Chantecler S.p.A.*, by the order of March 17th, 2016 under review.

In order to understand the scope of the ruling, it is important to examine the content of the reasoning.

First of all, the Court of First Instance took a position on the claimed principle of exhaustion of rights, according to which, as already anticipated above, the exclusive entitlements connected to the ownership of an exclusive property right are exhausted when the products, protected by that right, have been put on the market by its owner, or with his consent, in the territory of the specific Member State or in the territory of a Member State of the European Community, with the result that the holder of the right is no longer allowed to prohibit the further circulation of the goods in the specific Member State or in the European Community.[106]

Whereas this principle does not apply in presence of "legitimate reasons", *Chantecler S.p.a.*, in order to exclude the exhaustion of the right, deduced that it was the owner of an exclusive distribution network and that it has suffered serious and concrete prejudices due to the conduct of *Gens Aurea S.p.A.*.

In light of the above, the Court of Milan clarified that the existence of a selective distribution network does not *per se* exclude the exhaustion of the exclusive rights, since it must be accompanied by the existence of a serious and severe prejudice to

[106] Council Regulation (EC) No. 207/09/CE on the Community trademark (codified version) (Text with EEA relevance) [2009] *OJ L 78*, art. 13 repleced by Regulation (EU) 2017/1001 of the European Parliament and of the Council on the European Union trademark (Text with EEA relevance) [2017] OJ L 154 art. 15 see also art. 5 of the *codice della proprietà industriale*.

the *Chantecler*'s trademark caused by the third party due to the commercialization methodof the products.

According to the Court of Milan, *Chantecler S.p.A.*'s claims were not worthy of acceptance, in the absence of suitable elements pointing to the existence of a serious, concrete and severe prejudice to the trademark, provided that:

- the goods, purchased from an authorized retailer, were placed on sale by *Gens Aurea S.p.A.* in the "LUXURY ZONE" store located in the "*La Reggia Designer Outlet*" in Marcianise;
- The "*Reggia Designer Outlet*" was a shopping center, within which there were mono-branded and multi-branded stores, among the most renowned and prestigious;
- The store owned by the respondent, with the "LUXURY ZONE" sign, had a strategic position within the "LUXURY AREA" of the Reggia Designer Outlet, alongside other prestigious brands such as "*Valentino*", "*Prada*" and "*Roberto Cavalli*";
- The Respondent's "LUXURY ZONE" store sold, together with *Chantecler*'s products, other prestigious branded jewelry products (such as "*Damiani*", "*Morellato*");
- *Chantecler*'s products were sold inside the "LUXURY ZONE" point of sale in dedicated areas and display windows, with sales methods, display windows and furnishings that were appropriate for high-profile jewelry store.

In addition, according to the Court of Milan, it had not even emerged that the prices charged by the respondent, and relating to the collections of previous years, were lower both than those charged by authorized resellers and the ones charged by *Chantecler S.p.A.*, with regard to the collections of previous years, through direct online sales on the *Vente-Privè* website.

As can be easily understood, there is no substantial difference of principles set with respect to the so-called *Nashi-Nashi Argan* order, but only a different approach to the concrete case, with respect to the same abstract legal concepts.

While in the *Nashi-Nashi Argan* case, with the same hypothesis of selective distribution system, the concrete methods of sale were considered detrimental to the trademark and, for this reason, there was a legitimate reason to exclude the applicability of the principle of exhaustion of rights, in the *Chantecler* case, this prejudice was considered not substintent, in the light of an overall evaluation of the operational methods with which the products were marketed.

Chapter III

European case law on Selective Distribution after *Coty* and *Pierre Fabre*

SUMMARY: I. *Sisley v Amazon* Case - District Court of Milan. – II. *Asics* Case - German Federal Court of Justice. – III. *Guess* Case – European Commission Decision. – IV *Stihl* Case - French Autorité de la Concurrence. – V. *Ping* Case - UK Court of Appeal. – VI. *Puma vs. Lidl* Case - French Civil Supreme Court. – VII. *Nike / Action Sport / Amazon* Case - Amsterdam Court of Appeal.

I. *Sisley vs Amazon* Case[107] - District Court of Milan.

Equally important, in the jurisprudential panorama in question, is the order made by the Court Section Specialized in Business Matters on July 3rd, 2019, in the case named *Sisley vs Amazon*.

As in the previous *Chantecler* just examined, also in this case the provision overturns the precautionary decision issued by the same Court on October 19th, 2018.

In brief, the procedural story is retraced:

Société c.f.e.b. Sisley, *Sisley Italia S.r.l.* and *Société d'investissement et de license* (*Sisley*), asked that *AMAZON EUROPE CORE S.A.R.L.*, *AMAZON EU S.A.R.L.* and *AMAZON SERVICES EUROPE SARL* (*Amazon*) to be inhibited from using their brands and images and ordered the seizure of products and advertising materials, including websites, bearing the said trademarks and images, with the consequent withdrawal from the trade of the products and of the advertising materials in question.

The Court, with the order of October 19th, 2018, denied the precautionary request, considering that clause II.2 of the Sisley distribution contract contained a prohibition on cross-sales, between distributors belonging to the network, which would not have been effectively instrumental and proportionate to the strict satisfaction of the objectives of maintaining high levels of prestige and the reputation of the goods to which selective distribution is preordained, and therefore would have prevented the *Sisley* system from being considered extraneous to the application of art. 101 of the TFEU, resulting in the emergence of a "fundamental restriction" pursuant to article 4 (d) of the Regulation No. 330/2010, which in turn would have prevented the

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[107] Coourt of Milan Specialized Business Section R.G. 50977/2018 *SYSLEY ITALIA S.R.L. SOCIÉTÉ C.F.E.B. SISLEY, SOCIÉTÉ D'INVESTISSEMENT ET DE LICENSE* vs. *AMAZON EUROPE CORE S.A.R.L., AMAZON EU S.A.R.L., AMAZON SERVICES EUROPE S.A.R.L.* [2019] (*Sisley*).

exemption provided for by the aforementioned regulation from being applied to the agreement.

With the order of July 3rd, 2021, as mentioned, this position was fully reformed by the Court of Milan which, after having deemed the commercial conditions that *Sisley* submits to its resellers to be compliant with the principles established by VBER and EU jurisprudence , the lawfulness of the selective distribution system of the maison's luxury or prestige cosmetics.

In particular, considering the lawfulness of the selective distribution system of the products made by the complainants, as well as the nature of luxury and prestige products of the *Sisley*'s products, to be proven, the Court proceeded to examine the concrete methods of marketing, sales offerings, promotion and advertising of such products on the *Amazon.it* platform, considering it to be detrimental to the prestige and image of the *Sisley*'s brand.

For ease of understanding, the relative passage is reported:

"It is therefore necessary to check whether the claimed party complies with the standards that Sisley generally requires from its authorized distributors and, in the event of a negative outcome, whether these marketing methods do not comply with the required standards and are detrimental to the reputation of the famous brand operated, therefore removed from the principle of exhaustion. And indeed, from the productions of the complainants, as can also be seen in the image taken from the internet reproduced on page 12 of the complaint, the fact emerges that the Sisley products are shown and offered mixed with other items, such as products for the home and cleaning products, which are low-profile products and of little economic value. Also in the "Luxory Beauty" the Sisley brand is juxtaposed with low-end brands of much lower quality, reputation and price or in any case far less prestigious. Where it is considered, in its contracts, Sisley explicitly requires that its products be sold in luxury perfumeries or in specialized departments of perfumery and cosmetics in department stores, with qualified personnel, in a given urban context, it undoubtedly appears inadequate, compared to required standards, the sale of the products in question can be found alongside containers for microwaves, floor cleaning products and products for pets. Therefore, the marketing, offering for sale, promotion and advertising of Sisley's products alongside advertising material for products of other brands, including those of lower market segments, must therefore be considered detrimental to the prestige and image of the Sisley brand, on the same internet page.

Furthermore, the combination with products not belonging to the sphere of luxury and the presence of links that direct to completely different product sites also appear harmful. Finally, the lack of suitable customer service, similar to that ensured by the presence in the physical point of sale of a person able to adequately advise or inform consumers, considered a legitimate need by the Court of Justice, as it refers to the qualification of the staff, contributes to compromising that aura of exclusivity that has always distinguished the image of the Sisley brand, ensuring its owner fame and high regard in the cosmetics market".[108]

The decision in question is in continuity with both communitaria and national jurisprudence on the topic (which expressly refers to the well-known *Coty* ruling) and has as a key moment in the decision-making process the assessment of whether or not there is damage to the brand.

This is a ruling that demonstrates the favor of jurisprudence for the needs of protecting the image and prestige of branded products, even in the context of e-commerce, which plays an increasingly important role in consumer habits.

This not only in favor of the companies that own luxury brands, but also for the benefit of the members of the distribution network, who are required to make significant investments in order to guarantee the consumer a high-profile shopping experience, also with regard to the presentation of qualified assistance to the customer, rightly emphasized by the Milanese decision, on the basis of EU case law.

II. *Asics* Case - German Federal Court of Justice.

Another important decision on the subject under investigation is the one made by Germany's high court, the *Bundesgerichtshof* (BGH), under which it was held that the limitations imposed by *Asics*, on distributors in selective distribution systems to participate in online price comparison tools, are considered hardcore restrictions with the meaning of art. 4 (c) of the VBER.

This is an important ruling because it was made a few days after the well-known *Coty* ruling in the European Court of Justice and makes it very clear how the

[108] *Sisley*, 9-10.

evolutionary process arising from the european precedents in question was neither simple nor immediate.

The specific case concerned the following limitations imposed by *Asics* on its distributors:

a) Absolute prohibition to participate in price comparison tools:

b) Absolute prohibition to sell *via* third-party online platforms;

c) *De facto* absolute prohibition to advertise on third-party websites using *Asics*'s brands.

The German Federal Cartel Office decided that clauses 1 and 3 were hardcore restrictions under art. 4 (c) of the VBER and the BGH rejected the appeal, concluding it was absolute price comparison tool bans that amount to the hardcore restrictions in accordance with the same article.

According to the German Court, the admissibility of the provision on the prohibition of reselling on third party internet platforms (as stated in the *Coty* judgment) and, in particular, the admissibility of general prohibitions on the use of price search engines, would not follow the combined use of limitations - i.e. the prohibition of using price search engines and advertising on third-party platforms - to make a difference.

In fact, in this way, interested consumers would no longer effectively enjoy access to the retailer's internet offer.

Which the doctrine has opportunity to clarify, the Federal Court of Justice's judgment concerning the *Asics* case on the prohibition to support price comparison engines in apparence only contradicts the CJEU's statements. If fact, it has been considered unquestionable that the Bundeskartellamt has made a correct assessment in considering that a *per se* prohibition to support price comparison engines incorporte the provision under article 4(c) of the VBER concerning the hardcore restrictions.[109]

The ruling was that an appeal on points of law did not have to be granted and therefore the case did not need to be referred to the European Court of Justice. According to the Federal Court of Justice the prohibition applies irrespectively of the specific design of the price comparison engine and implement a considerable restriction of the retailer in the online sales' area.[110]

[109] Bundeskartellamt 'Competition restraints in online sales after *Coty* and *Asics* - what's next?" [2018] 4 Series of papers on "Competition and Consumer Protection in the Digital Economy" 1, 4.

[110] *Ibid*.

Moreover it has been argued that, unlike *Coty* case, there were no envolvement of luxury goods (i.e. running shoes). Additionally, the retailers were prohibited from exploit the *Asics* brand on third-party platforms and in (search engine) advertising. Given the combination of restraints, one of the main differences with respect to the *Coty* case was that, customers did not have access to the authorized dealers' online offer to an extent relevant in practice.[111]

On this point the doctrine clarifies that, in light of the above, it has been shown, that the decisions in Coty and Asics are not in contradiction.

Rather, the analysis indicates and emphasizes the necessity of having a deeper look into the underlying facts and circumstances of each case, which might lead to a different legal context within which a clause is to be assessed.

Namely, such differences might, for instance, bring in the nature of the selective distribution network, that is, a pure selective distribution system vs. a selective distribution system rendered lawful by supposedly complying with the VBER; certainly, in such context, the difference between luxury vs. non-luxury products is taken into consideration.[112]

Hence, the main difference lays on whether the ban on online sales falls outside the scope of article 101(1) of the TFEU since it is imposed on supplier within a pure selective distribution system and, on opposite, when the ban is presumably exempted from the application of article 101(1) of the TFEU since imposed on suppliers within a selective distribution system which is compliant with the VBER.[113]

Regarding the former, the test for the scrutiny of specific clauses is a test of proportionality, that is to assess, "*whether such prohibition is appropriate*"[114] and does not go "*beyond what is necessary*"[115] in light of the objective pursued, which is, in the given example of *Coty*, to preserve the luxury image of the goods.[116]

With this in mind, also considering the underlying reasons for the operating of a pure selective distribution network, it seems reasonable that when executing a selective distribution agreement, compliant with article 101(1) of the TFEU, online sale bans might be considered as a restriction to competition, however, considering their actual

[111] *Ibid*.
[112] Bernadette Zelger 'Restrictions of online sales and vertical agreements: Bundeskartellamt vs. Commission? Why Coty and Asics are compatible' [2018] 14, 2-3 ECJ 445, 461.
[113] *Ibid*.
[114] Coty, [43].
[115] *Ibid*.
[116] Bernadette Zelger 'Restrictions of online sales and vertical agreements: Bundeskartellamt vs. Commission? Why Coty and Asics are compatible' [2018] 14, 2-3 ECJ 445, 461.

effects (by applying a proportionality test in order to assess whether the restrictions are appropriate and do not go beyond what is necessary) rather than as restriction of competition by object.[117]

In the author's view, such an approach is valuable as it meets the new challenges linked to digitalization by developing a coherent standard which applies to both, "real world" and online markets, so that the legal framework seem to analogously apply to selective distribution's comparable practices in the online world.[118]

Having said this, if it is clear that, with the ruling in question, the Bundesgerichtshof (BGH) is not in conflict with Community jurisprudence and the *Coty* judgment has in fact established principles and distinctions that limit its extensive scope.

III. *Guess* Case – European Commission Decision.

Consistent with the principles of EU jurisprudence, the decision on the *Guess*[119] case of December 17th, 2018, issued by the European Commission, arose at the outcome of the proceedings instituted against the *Guess Group*, in light of the results of the inquiry in the electronic commerce sector and after careful examination of the clauses of the individual contracts concluded between *Guess* and its distributors and resellers. The *Guess Group* was fined for approximately forty million euros, for violation of art. 101 of the TFEU and article 53 of the Agreement on the European Economic Area.

According to the European Commission, the *Guess Group* had created a selective distribution system operating throughout the European Union that illegitimately compressed intra-brand competition, even to the detriment of consumers, by imposing, on both distributors and retailers, excessive limits on sales outside the territories assigned to them, as well as on on-line sales and promotional activities that the companies of the *Guess Group* carried out almost exclusively.

In the provision in question, the Commission reiterated that selective distribution, which is certainly legitimate in itself, cannot in any case impose arbitrary and / or discriminatory and / or unnecessary limitations in order to maintain a particular qualitative level of the system.

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117 Bernadette Zelger 'Restrictions of online sales and vertical agreements: Bundeskartellamt vs. Commission? Why Coty and Asics are compatible' [2018] 14, 2 3 ECJ 445, 461.

118 *Ibid.*

119 AT-40428 *Guess?, Inc., Guess? Europe, B.V. and Guess Europe Sagl* [2019] OJ C 47 (Guess)

As for the specific case, the contested limitations were the following:

- restriction of online sales: Guess allowed its retailers to sell through e-commerce, only after having obtained, from Guess itself, an authorization left to the pure discretion of the same, thus giving life to a discriminatory system which, excluded retailers from the on-line channel, eliminating their competitiveness even to the detriment of end consumers.
- online advertising: Guess prohibited its distributors and retailers from using the Guess name and brands for the Google Adwords service, generating an undue competitive advantage in favor of Guess to the detriment of its retailers, especially in the e-commerce channel , in light of the online sales restrictions imposed on distributors;
- "cross-sales" between distributors and resellers: distributors and resellers could purchase Guess items only from the companies of the Guess group and not from other distributors belonging to the selective distribution system, with consequent limitations, both for sales and for purchases in limited territorial areas within the Member States.
- retail sales outside national borders: Guess prevented retailers from selling Guess products outside the assigned territorial area, effectively preventing retailers from even carrying out the promotional activity, outside the 'assigned territorial area;
- imposition of sales prices: Guess required members of the selective distribution network to comply with the indications and price lists provided by the fashion house.

The European Commission considered that the restrictions described above constituted an unlawful hypothesis of limitation to passive sales and, as such, must be expressly prohibited by virtue of art. 101 of the TFEU and EU Regulation No. 330/2010 (in particular, artt. 1, 2 and 4).

The decision in question had a wide media coverage as it came a few days after the entry into force of the EU Regulation on the prohibition of geo-blocking[120] (in relations between companies, so-called "professionals", and consumers), which established the nullity of the aforementioned prohibition, if it results in a discriminatory limitation of access to goods and services to European consumers.

[120] Regulation (EU) 2018/302 of February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC [2018] OJ L 60I.

This ruling is certainly in line with the principles of the european case law, which clearly makes us understand the need of a mediation between the opposing protection's needs of all the subjects operating in the market.

The scope of the decision was amply enhanced by the legal commentaries which, while noting its specificities and peculiarities, were able to highlight how the European Commission found that an absolute ban on using trademarks and brand's names for online sales advertising, which prevents authorized distributors from bidding on these keywords at online advertised auctions (and therefore presently reserving this privilege to *Guess* only), was a restriction of competition by object.[121]

Surprisingly, the European Commission did not link this finding to the other, additional restrictions imposed on the distributors, let alone on a *de facto* prohibition of online sales, but considered the keyword bidding ban to be a hardcore restriction in itself.

IV. *Stihl* Case - French Autorité de la Concurrence.

By its decision[122] dated October 24th, 2018, the FCA (French Competition Authority) adopted its first post-*Coty* case decision on selective distribution and online sales.

The dispute was pitted between *Andreas Stihl SAS* and *Stihl Holding AG & Co KG* (*Stihl*), a leading company in the production and marketing of gardening machinery and some distributors in the distribution chain of the same.

Part of the distributors had disputed that *Stihl* prohibited their distributors from selling on the online channel, while others had disputed that the ban was envisaged only for third-party platforms.

The defense of the manufacturing companies had focused on the intrinsic danger of their products, which, precisely for this reason, should have been marketed through assisted sales at the selected stores, to guarantee the end customer all necessary pre and post sales assistance.

While considering the concern of the companies, on one hand, considered correct the prohibition imposed on its distributors to sell through third-party platforms, since

[121] Tilman Kuhn and Mathis Rust 'Who'd have guessed: Coty did not end the debate!' [2019] White&Case 1, 4 <https://www.whitecase.com/publications/article/whod-have-guessed-coty-did-not-end-debate> accessed on July 21st, 2021.

[122] Paris Court of Appeal No 18/24456*, Andrea Stihl, Stihl Holdong AG & CO KG vs French Competition Authority* [2019] 35L7-V-B7C-B6YHL (*Stihl*)

according to the typical sales methods of these portals, the seller could not have correctly fulfilled the information obligations and, not being immediately identifiable, not even provide after-sales assistance, on the other hand considered the general ban on sales in the online channel unlawful.
The reasoning behind the decision is, in substance, that the information and support needs expressed by *Stihl* were not in themselves incompatible with an online sale, in consideration of the fact that this could in any case, take place through a dedicated website or subsequently be provided, for example by offering support at the physical headquarters of the distributor.
The FCA fined the chainsaw manufacturer *Stihl* for having disproportionately restricted its retailers' online sales between 2006 and 2017.
Stihl made a second appeal while waiting for the FCA's decision before the Court of Appeal of Paris, but the same court confirmed the decision of the FCA.
The French Court, in reiterating the correctness of the FCA's approach, confirmed that the restriction imposed on distributors, not to use the online channel, was completely unjustified, also because the restriction was applied to professional and non-professional users without any distinction.
It also pointed out that online assistance (i.e. not necessarily a hand delivery) could be an appropriate instrument to guarantee the proper use of the product and the users' safety.
Moreover, the parisian Court stated that the object infringement was not liable to be exempted considering that direct advice by authorized dealers, whilst useful, was not necessary.

What can be extrapolated from this case is that, although selective distribution systems allows wide restrictive powers, these limitations cannot be unjustified and must, in any case, be limited and balanced with the needs of all the parties involved, from the distributors to the final customer.

V. *Ping* Case - UK Court of Appeal.

Another important pronouncement[123] relating to the subject under investigation is that made on January 21st, 2020, by the UK's Court of Appeal which ruled that the

[123] UK Court of Appeal Case C3/2018/2863, *Ping European Limited vs Competition Appeal Tribunal* [2020] EWCA Civ 13 (*Ping*).

online sales restrictions contained in *Ping*'s ISP constituted a restriction of competition by object, under art. 101 of the TFEU and therefore under the prohibitions of Chapter I of the Competition Act 1998, which is itself modeled on article 101.

The object of the dispute concerned the prohibition envisaged for retailers to use the online channel for the marketing of products, which can be justified upon the assumption that *Ping* products being sports accessories for golf which are personalized and "calibrated" to the customer, are not conciliatory with this method of sale, as it is not suitable for guaranteeing the quality and service typical of the brand.

For that reason, the manufacturer which had been sanctioned by the Competition Market Authority (CMA) for £ 1.45 million challenged the decision, but only and exclusively obtained from the Competition Appeal Tribunal (CAT) a reduction of the fine to £ 1.25 million.

Ping appealed the CAT's ruling, but again unsuccessfully, given that with the decision in question, the Court of Appeal upheld the CAT's judgment, holding that there was an established body of applicable EU case law and EU decisional practice determining that, for the purposes of art. 101 of the TFEU, the imposition by a supplier of a prohibition on internet sales by authorized dealers in a selective distribution network reveals a sufficient degree of harm to competition and so constitutes a restriction by object, being excessively restrictive and concretely unjustified.

In the decision, which is in line with EU jurisprudence, a very important concept is reiterated, namely that the constraint can be illegitimate not only when the restriction of competition is the only objective pursued, but also when it pursues legitimate objectives.[124]

Preventing online sales, as done by *Ping*, entails, according to the Court, evident damage to both final consumers and distributors.

As far as end customers are concerned, it is clear that the absence of the product on the online channel makes it more difficult to compare the prices applied by the various retailers, while distributors are effectively prevented from selling outside the restricted geographical area where they are located.

[124] John D Colahan and Anui Ghai 'Competition Law and Online Sales Restrictions: UK Court of Appeal Judgment in Ping' [2020] Latham&Watkins 1, 2 <https://www.latham.london/2020/03/competition-law-and-online-sales-restrictions-uk-court-of-appeal-judgment-in-ping/> accessed on July 21st, 2021; see also Case C-67/13P, *Groupement des cartes bancaires vs European Commision et al.* [2014] EU:C:2014:2204 (*Cartes Bancaires*).

Based on these assumptions, a lack of proportionality was recognized between *Ping*'s conduct and the objective pursued, and, as mentioned, the provision of personalized assistance to the customer was not deemed suitable to justify the ban on online sales.[125]

VI. *Puma vs. Lidl* Case - French Civil Supreme Court.

Another important ruling on selective distribution is the one that decided the dispute that arose in France between *Puma* and *Lidl*[126], following which the French Supreme Court ruled that the depiction of branded goods in a discount supermarket chain advertising brochure is unfair if it is liable to damage the reputation of said brand.

In the specific case, *Puma* challenged *Lidl*'s conduct, for having the latter represented, depicting *Puma* branded backpacks on one of its advertising flyers alongside other products of the discount supermarket, including low-priced groceries.

The choice of *Lidl*, in fact, generated the concrete effect of debasing the value and prestige of the *Puma* brand, whose products, marketed through selective distribution that aim to enhance their value, were, in fact, equated with products from low quality discounters.

It is easy to see how, even in this case, the enhancement of the concept of luxury is particularly accentuated and this in line with the strong sensitivity of French jurisprudence to the needs of this market segment, also dictated by the fact that, in France, there are many producers of excellent brands.

In this we cannot fail to notice a strong proximity to Italian jurisprudence (in particular that of the Court of Milan).

VII. *Nike / Action Sport / Amazon* Case - Amsterdam Court of Appeal.

Of great importance, at the end of the jurisprudential overview presented, is the sentence[127] handed down on July 14th, 2020, by the Amsterdam Court of Appeal,

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[125] André Pretorius et al., 'Court of Appeal ruling in *Ping* confirms that online sales ban amounts to serious infringement of competition rules' [2020] Legal Briefings, Herbert Smith Freehills <https://www.herbertsmithfreehills.com/latest-thinking/court-of-appeal-ruling-in-ping-confirms-that-online-sales-ban-amounts-to-serious> accessed on July 21st, 2021

[126] French Civil Supreme Court No 19-13.479, *Puma France SAS vs. Lidl SNC* [2020] FR:CCASS:2020:CO00661 (*Puma*)

[127] See n. 4.

which confirmed that the *Nike*'s European distribution company (so called Nike European Operations Netherlands - *NEON*), had rightfully terminated its distribution agreement with one of its authorized distributors, *Action Sport*, because it had persistently sold *Nike* products through an unauthorized third-party platform (i.e. *Amazon*).

The judgment under consideration aligns with the initial decision made by the Amsterdam District Court and clarifies that marketplace bans in distribution agreements do not constitute hardcore restrictions within the meaning of artt. 4 (b) and (c) of the VBER.

If this ruling concerned luxury products, there would be no substantial change with respect to the Community and national jurisprudence following the well-known *Coty* ruling.

What, however, makes the present ruling extremely interesting is that the Amsterdam Court of Appeal considers irrelevant whether the *Nike* products concerned are qualified as luxury products, thus extending the scope of a principle that, until now, had been concretely applied in the field of luxury and prestige products.

In the ruling in question, it is pointed out that the luxury nature of the products in the *Coty* case has no relevance regarding whether marketplace bans constitute a hardcore restriction within the meaning of artt. 4 (b) and (c) of the VBER, as the distributor is not prohibited from using the online channel, but the possibility of using of marketplaces to a limited number of authorized platforms is limited.

On this assumption, the ruling in question consistently considers the conduct of *NEON* to be correct and the limitation imposed on the distributor is legitimate in relation to current legislation.

In reality, the ruling is in continuity with the observations of the European Commission's Directorate General for Competition which, in April 2018, shortly after the Coty ruling, published the Competition Policy Brief[128] entirely dedicated to the examination of this ruling and, also in line with Attorney General Whal's opinion, he had already interpreted the scope of the Coty ruling as "*a prohibition on online sales of non-luxury goods via online marketplaces does not fall within the prohibition of Article 10, provided the Metro criteria are satisfied*".[129]

[128] Competition Policy brief see n. 70.

[129] Yves Botteman and Daniel Barrio 'From *Pierre Fabre* to *Coty* and Beyond: How Far Can Suppliers Ban Online Sales?' [2019] 10, 9 JECL & Pract 519, 526.

Even in the legal debate, after the Coty ruling, this position immediately emerged strongly, reaching conclusions not different from those of the Amsterdam Court of Appeal: "*I conclude with a remark about how broadly the economic reasoning that I have outlined can apply. Pierre Fabre and Coty were about luxury goods. But the theory applies equally well to any good for which brand image is important. Running shoes or basketball shoes, for example, may command prices well over €100 not because of the quality of the laces, stitching or construction but because consumers value brand names such as Air Jordan, Nike or New Balance. The normative principle of consumer sovereignty demands that public policy respect consumers' choices – and that public policy respect manufacturers' efforts to protect brand image so highly valued by consumers*".[130]

Probably the extensive interpretation of the principles set out in the Coty judgment could have been quicker if the wording of the pronouncement had been clearer on the point, as correctly evidenced by the doctrine.[131]

[130] Ralph A. Winter '*Pierre Fabre*, *Coty* and Restrictions on Internet Sales: An Economist's Perspective' [2018] 9, 3 JECL & Pract 183, 187.
[131] Giuseppe Colangelo and Valerio Torti, 'Selective Distribution and Online Marketplace Restrictions under EU Competition Rules after Coty Prestige' [2018] 14, 1 ECJ 81, 104-105.

Chapter IV

The European Commission's review of the Vertical Block Exemption Regulation

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On September 8th, 2020, the European Commission published the "Staff Working Document Evaluation"[132], that summarizes the results of the evaluation process for the review of the VBER. This concludes an important step in the process of revising the Regulation, which will expire on May 31st, 2022.

The review activity is divided into two phases:

- the first, as mentioned, called "evaluation phase", from 2018 to September 2020;
- the second, called "Impact Assessment": an assessment of the review options, currently underway.

At the end of the first phase, the "Staff Working Document Evaluation" was published by the European Commission.

The document summarises the European Commission's review of the VBER, after a decade of practical implementation.

This evaluation has been carried out by assessing the strengths and weaknesses of the Regulation No. 330/2010 in the context of the evolving market environment that has characterised the European Union over this lasts and complex decades.

The aim of the study has alsbo be to assess, at the end of the survey, whether to let the VBER expire or renew.

Moreover, the document provides a clear and detailed explanation of the purpose, methodology, and questions being addressed, with an in-depth analysis of all the input and requests received from stakeholders.

The investigation has been very thorough and characterised, among other things, by a so-called "counterfactual analysis" approach, i.e. a market assessment, assuming a situation where the VBER and its GVR were not present.

The European Commission has also referred to a multitude of sources, including public consultation, a dedicated workshop in 2019, where stakeholder contributions were gathered, and a considerable number of studies commissioned from specialists, for each of the areas considered relevant.

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[132] See n. 6.

A detailed description of each topic addressed is provided in Attachment 4 of the Staff Working Document Evaluation, called "Overview of Issues Identified During the Evaluation Process".

The Staff Working Document Evaluation highlighted how the VBER is, still today, a fundamentally important and useful tool, but that, however, it is necessary to make changes to make the regulation more effective and efficient.
In this respect, an initial need that has emerged is that of a revision of the text in order to harmonise it with the jurisprudence of the European Court of Justice, which has developed, in the meantime, extending the lawfulness of vertical restrictions already present in practice and complying with the conditions imposed by art. 101(3) of the TFEU, in line with the new current market requirements.

A further and relevant concern of the European Commission is that the VBER, as designed in 2010, is not adequate to deal with the issues related to the evolution of the e-commerce market, online sales and with the new market players, such as online platforms, which has generated a large number of new issues, also in relation to the restrictions imposed ("free riding", retail parity clauses, online advertising, restrictions on online sales, dual pricing, etc.).
However, it is of immediate perception that the use of the web that companies could make in 2010, is not what can be guaranteed today.

Apart from the currently complete interconnection between real and virtual, with just a few clicks anyone is able to obtain information on products, prices, features, reviews, so much that we now speak of an omni-channel process, i.e., a market in which the end customer is involved in an experience in which there is no longer a clear dividing line between real and virtual.
This omni-channel concept has been made even more pervasive during the ongoing Covid-19 pandemic, with an extension of the virtual experience, not only limited to marketing and sales, but also to customer care, retail, logistics and supply chain.
It is clear that in order to provide a coherent, effective and satisfactory response to the new requirements that this changed set-up imposes, the 2010 rules cannot be considered in step with the challenges that today's market imposes.

As for the phase called “Impact Assessment”, currently underway, it envisages, like the previous one, a first part dedicated to the acquisition of information and feedback, also through public consultation by means of an online questionnaire, and then a second part concerning the specific preparation of texts with draft amendments to the VBER, originally envisaged for June 2021 and currently still under definition.

Specifically, all the criticalities highlighted in the study phase will have to be addressed and resolved as best as possible, seeking to provide the best solutions to give adequate responses to the needs of a new market.

The proposed changes thus identified will then have to be submitted for public consultation by 31 May 2022, in order to be implemented before the VBER expires.

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Conclusion

As illustrated in this paper, selective distribution is today the typical method for commercializing luxury products.

In a globalised market where the figure of the distributor has become an essential element for any company with an international scope, the need to ensure that the end customer has a unique shopping experience, consistent with the brand's profile, requires the distributor to have certain specific characteristics and act in a way that enhance its prestige.

As explained, this is immediately perceptible, for instance in terms of layout, exhibition, selection of location, choice of points of sale or in the management and training of the personnel. The topic become even more complicated due to the ever-increasing importance of the online channel, which has become both an essential tool for entrepreneurs and a dangerous source of risk in contact with customers, especially in a field - that of luxury - where the *pre* and *post*-sales experience is an intrinsic part of the appeal of a product.

The value of a brand is not only manifested by the physical or conceptual characteristics of the product, but also by the channels and the modalities of distribution used. To achieve this, it is necessary to set requirements and impose limits which, at a communitarian level, must be balanced with the well-known European free competition's principles.

In order to provide a clear and precise context of the scope of reference, the first chapter of this thesis has been devoted to the examination of the relevant body of law, clarifying the purpose and scope of articles 101 and 102 TFEU, illustrating the differences between horizontal agreements and vertical agreements and examining, in relation to the latter, the detailed framework, paying particular attention to the provisions of the 2014 *De Minimis* Notice, the VBER, article 101(3) of the TFEU and the 2010 EU Commission Guidelines on Vertical Restraints.

The introductory chapter then focused on selective distribution, analysing the leading cases *Pierre Fabre* and *Coty*.

Particular attention has been paid to the examination of the judgment *Coty*, a true milestone in the field and a precedent cited without interruption in all subsequent case law.
In the aforementioned judgment, the CJEU clarified the compatibility of selective distribution systems' requirements with article 101 of the TFEU, setting out principles that, in ruling the concrete case, have been, as mentioned, the legal basis for all subsequent communitarian and nationals courts.

Once completed the legal and jurisprudential context, the second and third chapters examined the development of the relevant case law, with the specific aim of verifying continuity and discontinuity with the milestone judgments.
In particular, chapter two examined the cases *Nashi-Nashi Argan* and *Chantecler*, focusing on the concrete application of IP law's principle of exhaustion of trademarks in the luxury market.
In chapter three, by analysing all further relevant precedents, it has been possible to understand how, over the years, the development of case law has substantially maintained a continuity.

As it has been made clear from the very beginning of the present study, even in those rulings in which, on a first examination, apparent discontinuities could be envisaged, such as in *Asics* case, the established principles of the previous rulings are never subverted or disregarded but, more simply, the cases focus on their application to the concrete case.
It has to be considered that EU principles, once interpreted in the different national contexts, can assume different nuances, also in consideration of the local tradition and sensitivity of the specific nation to the concept of luxury. However, this did not obstruct the issuing of a succession of rulings that has been characterised by an evolution in continuity, not by renovation or contrast.

The survey also brought to light another important fact, namely that, even if the luxury market is undoubtedly the most ideal environment for the concrete application of a selective distribution system, the same rules and concepts could also be applied outside this environment.

Such awareness occurred in a timely manner by the Amsterdam Court of Appeal in the *Nike / Action Sport / Amazon* case that, moreover, resumed concepts and arguments already present, albeit in a not so evident way, in *Coty*.

The examination of the above-mentioned European case law was also very useful to define the concrete scope of the discussion that the European Commission is managing in relation to the, now imminent, expiry of Regulation (EU) No. 330/2010, scheduled for May 31st, 2022.
What emerged from the European Commission's activity of review is that, while the importance and usefulness of the VBER was unanimously recognised, this tool, which dates back to 2010, needs to be revised and harmonised in order continue to perform and be up to date to 2022.
The European Commission has highlighted the need for a direct transposition of the principles underlying the decisions of European case law, as well as to extend the lawfulness of vertical restraints, already present in practice and complying with the conditions imposed by article 101(3) of the TFEU, with the new current market requirements.
Another fundamental critical point and challenging element was identified in the need to draft a new regulatory framework capable of dealing with the problems associated with the evolving market of the e-commerce.
The EC, as well as the case law, has demonstrated great attention to guaranteeing market players suitable instruments to ensure a balance between the needs of all the players involved and the communitarian principles of free competition.
This sensitivity in the research of convergence points is undoubtedly commendable, because, despite the difficulty of reaching a satisfactory synthesis, the effort made has been important and the level of attention to detail considerable.

It is not immediate to predict what the future will bring, but, in light of the path followed by the European legislator and by the European and national case law, it is undeniable that all the prerequisites for a new system of incisive rules consistent with the current times and market are present.
The challenge is important because we are experiencing a total interconnection between the real and the virtual, in which the end customer is part of a so-called omni-channel process, made even more pervasive following the ongoing Covid-19 pandemic situation.

The current question is whether a revised VBER will be sufficient to cope with such a significant market change and, in consideration of what has been analysed in this paper, in order for this change to happen it is essential, first of all, that future case law maintains its evolutionary strength in a context of continuity.
It is clear, in fact, that for market operators it is essential to have certainty as to the "rules of the game", because any contrast or doubtful interpretation may give rise to deviant practices, which may become complex to remedy.
It is also important, in the writer's opinion, that the next revision of the VBER will not be scheduled for an excessively distant time.
The expiration of the VBER is scheduled for May 31st, 2022. Twelve years could represent an overlong long time if speediness of market evolution will be the same that can be foreseen today.

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Annexes

English Abstarct

The subject of the present thesis is the Selective Distribution system in the luxury world and, in particular, the selective distribution marketplace's bans under the block exemption for vertical agreements.

This paper ramified in four interconnected parts, and it starts by describing the content of the well-known competition law provisions under articles 101 and 102 of the Treaty on the Functioning of the European Union, as well as explaining in detailed what is considered to be a vertical agreement under the same provisions.

It then follows a more detailed analysis of the assessment that needs to be done in order to individualized if a vertical agreement can be exempted from the application of article 101(3) of the Treaty on the Functioning of European Union, according to the Commission Regulation No. 330/2010/EC (VBER) and to the Guidelines on Vertical Restraint (VGL).

After the theorical analysis have been made, it follows a specific evaluation on the possibility for a selective distribution agreement to be exempted under the VBER and, in particular, of the so-called "Metro Criteria", that further clarifies the application of the VBER. This first chapter is then completed with an overview of the two leading cases on this topic: the *Coty* and *Pierre Fabre* cases.

Chapter 2 of this thesis explores how competition law and, in particular, the selective distribution system, interrelates with an important principle of IP Law, which is the principle of exhaustion. Under this topic, the relvant *Silhouette* case is examinated, which ruled that the principle of international exhaustion has no application within the EEA, whenever a goods was first placed on the market outside the EEA. On this matter, two important judgment of the Court of Milan are analyzed: *Nashi* and the *Chantecler* cases.

It follows an explanation of the different european case law on the application of the third-party online platforms' bans (implemented by manufacturer), meaning the different interpretations of the *Coty* case, ruled in differents European Member States. Therefore, Chapter 3 goes through an examination of the European case law from the *ASICS* case in Germany to the *Nike / Action Sport / Amazon* Case in the Netherlands, both referring to the Coty Case, or the *Stihl* case in France, concerning the exploration of the benefits or justifications for broadening the scope to non-luxury products from.

Since the current Vertical Block Exemption Regulation, No. 330/2010 will expire on May 31st, 2022, it follows a study on the evaluation of the questions that arose during the period of application of the above-mentioned Regulation, summarized in the publication of the "Staff Working Document Evaluation" of the European Commisison. The growing of the internet world and the implementation of an "omnichannel" reality are having a strong impact on the retail world and this is one of the main issues beared in mind by the stakeholders of the new Regulation.

German Abstarct

Gegenstand der vorliegenden Arbeit ist das selektive Betriebssystem in der Luxuswelt und insbesondere die Verbote des selektiven Vertriebsmarktes im Rahmen der Gruppenfreistellung für vertikale Vereinbarungen.

Die Arbeit gliedert sich in vier miteinander verbundene Teile und beschreibt zunächst den Inhalt der bekannten wettbewerbsrechtlichen Bestimmungen nach Artikel 101 und 102 des Vertrags über die Arbeitsweise der Europäischen Union und erläutert ausführlich, was unter diesen Bestimmungen als vertikale Vereinbarung gilt.

Es folgt eine detailliertere Analyse der Beurteilung, die vorgenommen werden muss, um zu individualisieren, ob eine vertikale Vereinbarung gemäß der Verordnung Nr. 330/2010/EG der Kommission (GVO) und den Leitlinien für vertikale Beschränkungen (VGL) von der Anwendung des Artikels 101 Absatz 3 des Vertrags über die Arbeitsweise der Europäischen Union (AEUV) freigestellt werden kann.

Nach der theoretischen Analyse folgt eine spezifische Bewertung der Freistellungsmöglichkeiten für selektive Vertriebsvereinbarungen nach der GVO und insbesondere der sogenannten "Metro-Kriterien", die die Anwendung der GVO weiter verdeutlichen. Dieses erste Kapitel wird dann mit einem Überblick über die beiden führenden Fälle zu diesem Thema abgeschlossen: die Fälle „Coty“ und „Pierre Fabre“.

In Kapitel 2 dieser Arbeit wird untersucht, wie das Wettbewerbsrecht und insbesondere das selektive Vertriebssystem mit einem wichtigen Grundsatz des Rechts an geistigem Eigentum zusammenhängt, nämlich dem Erschöpfungsgrundsatz. Im Rahmen dieses Themas wird der relevante „Silhouette“-Fall untersucht, in dem entschieden wurde, dass der Grundsatz der internationalen Erschöpfung innerhalb des EWR keine Anwendung findet, wenn eine Ware zuerst außerhalb des EWR in Verkehr gebracht wurde. Zu diesem Thema werden zwei wichtige Urteile des Mailänder Gerichtshofs analysiert: die Rechtssachen „Nashi“ und „Chantecler.“

Es folgt eine Erläuterung der unterschiedlichen europäischen Rechtsprechung zur Anwendung der (vom Hersteller umgesetzten) Verbote von Online-Plattformen für Dritte, d. h. die unterschiedlichen Auslegungen des Falles „Coty,“ die in verschiedenen europäischen Mitgliedsstaaten beschlossen wurden. Daher wird in Kapitel 3 die europäische Rechtsprechung vom „ASICS“-Fall in Deutschland über den „Nike/Action-Sport/Amazon“-Fall in den Niederlanden, die sich beide auf den „Coty“-Fall beziehen, bis hin zum „Stihl“-Fall in Frankreich untersucht, um die Vorteile bzw.

Begründungen für die Ausweitung des Anwendungsbereichs auf Nicht-Luxusprodukte zu erforschen.

Da die derzeitige Vertikal-Gruppenfreistellungsverordnung Nr. 330/2010 am 31. Mai 2022 ausläuft, folgt eine Studie zur Bewertung der Fragen, die sich während der Geltungsdauer der o. g. Verordnung ergeben haben, zusammengefasst in der Veröffentlichung der "Staff Working Document Evaluation" der Europäischen Kommissison.

Die wachsende Welt des Internets und die Implementierung einer Omni-Channel-Realität haben einen starken Einfluss auf die Einzelhandelswelt, und dies ist eines der Hauptthemen, das von den Interessenvertretern der neuen Verordnung im Auge behalten wird.