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Distribution agreements and EU Competition Law: the Pierre Fabre Case and its consequences on Internet distribution

DISTRIBUTION AGREEMENTS AND EU COMPETITION LAW: THE *PIERRE FABRE* CASE AND ITS CONSEQUENCES ON INTERNET DISTRIBUTION

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ABSTRACT

Background and potential value of the topic.

On 20 April 2010, the European Commission adopted a new Block Exemption Regulation (no.330/2010) and Guidelines on Vertical Restraints, which emphasize the distributors' ability in any type of distribution system to use the Internet.

The European Court of Justice rendered on 13 October 2011 in the *Pierre Fabre* case a landmark ruling concerning the regime of online sales in the context of selective distribution, setting out the basis for the approach to be followed on similar issues arising in the future to the entire spectrum of distribution agreements. On 31 January 2013 the Paris Court of Appeal delivered a judgment following the EU Court's response on its preliminary ruling.

The debate currently faced by competition law in its approach on addressing online sales is particularly important as it illustrates a larger conflict within competition law, linked to the economic issue of online sales regulation in a transition phase between a

physical and a mixed method of distribution combining physical sales and online sales, the so-called "click&mortar" form of distribution.

Internet remains one of the most interesting new frontiers for competition law.

Purpose

The purpose of this paper is to give a view of the current approach of EU competition law on addressing distribution via the Internet and to assess the consequences of *Pierre Fabre* on online sales in distribution agreements, in the present transition phase between a physical and a mixed method of distribution.

Methods

The dissertation is practically oriented, as it focuses on a case. It analyzes the consequences of *Pierre Fabre* case by assessing critically the Judgment under an economics-based approach, and by subdividing the possible means of restriction of online sales into two categories: those that are generally acknowledged and accepted by European or national courts and/or competition authorities and those that are contested and disputed. In order to obtain a more effective assessment of these practices, reference is made to many European and national cases, under a comparative perspective.

Nevertheless, a prior theoretical overview of the EU competition law applicable to distribution agreements is necessary to contextualise the decision of the European Court of Justice.

Chapter Outline

I. *Pierre Fabre*: legal background and presentation of the case

The first chapter encompasses a brief overview of EU competition law applicable to distribution agreements and the presentation of the case at issue, describing all its stages from the decision of the French Competition Authority to the judgment of the Paris Court of Appeal rendered on 31 January 2013.

II. Consequences of *Pierre Fabre* on Internet distribution

The second chapter focuses on the actual implications of the Judgment.

Its purpose is to assess critically, on the one hand, the extent of the general principle set by the Court of Justice of the prohibition to prohibit distributors from selling contract products online (Section 1) and, on the other hand, the practical means by which this type of sales can be regulated and restricted even after such an outright ban (Section 2).

Conclusions

The *Pierre Fabre* judgment, adopting a legal and formal approach, seems to have fixed for a moment the substantive law, stating that it is forbidden to ban Internet sales. However, the possibility to limit and to regulate this method of selling under EU competition law and case law remains, especially regarding qualitative restrictions.

The Court of Justice, in identifying the anti-competitive object of a restraint, should focus on the content of the provisions, as well as on the objectives and the economic and legal context of the constraint. The Court should find a balance between the "per se rule" approach actually used in *Pierre Fabre* and the "rule of reason" method, taking into account also the circumstances of the restriction.

Finally, some observations on how to build a more effective law on this issue are provided.

Sources

During the researches the author used primarily case law and official printed sources, such as European Commission Regulations and Guidelines, but also books, journal articles and other sources like Commission reports, interviews and articles available online only.

Abbreviations

AG	Advocate General
AG Opinion	Opinion of Advocate General Mazak of 3 March 2011, C-439/09 P *Pierre Fabre* Dermo-Cosmétique SAS/Président de l'Autorité de la concurrence, Ministre de l'Économie, de l'Industrie et de l'Emploi.
Commission	European Commission
Commission observations	Observations de la Commission des Communautes Europeennes en application de l'Article 15, paragraphe 3 du Reglement n° 1/2003 dans l'affaire *Pierre Fabre*, 11 June 2009
EC (or EC Treaty)	Treaty Establishing the European Community (1997)
ECJ	European Court of Justice
EU	European Union
NCA	National Competition Authority
OJ	Official Journal of the European Union
PFDC	*Pierre Fabre* Dermo-Cosmétique
RPM	Resale Price Maintenance
TFEU	Treaty On the Functioning of the European Union (2012)
VBER	Block Exemption Regulation Applicable to Vertical Agreements (Commission Regulation 330/2010 of 20 April 2010 on the Application of Article 101(3) to Categories of Vertical Agreements and Concerted Practices)
Vertical Guidelines	European Commission Guidelines on Vertical Restraints(2010)

Indice

INTRODUCTION

"*There are two kinds of business models: those that have been disrupted by technology, and those that have yet to be. Any business model that can be disrupted by technology will be, and probably should be.*" [1] (D. Tapscott, *The Wall Street Journal*, 29 June 2011)

Early as 1996 Bill Gates, the founder of Microsoft, imagined that the Internet would help achieve "friction free capitalism" by putting buyer and seller in direct contact and providing more information to both about each other. [2]

. Such a direct connection would have abolished traditional market imperfections, like physical distance, lack of information, lack of choice, and local regulation. He named this process "disintermediation".[3]

At that time, Amazon and eBay had been established newly and were largely unknown outside of the US, and Google and social media companies were not even in an embryonic phase. Nevertheless, the potential of the internet and e-commerce was clear, at least to some "pioneers". Nowadays, this fact is evident to many others.

As the European Commission stated in the opening sentence of its e-commerce Action Plan, *"the Internet has revolutionised the everyday lives of Europeans in a way comparable to the industrial revolutions of the previous centuries."*[4]

Indeed, the Internet and in particular the development of mobile broadband have provided an unprecedented means of communicating and interacting. All this has made the Internet a burgeoning avenue for commerce.

The rise of the Internet, as a new channel of distribution, represents a tremendous innovation in the way goods can be promoted and purchased. Taking advantage of constant interaction with their users, companies operating online can easily and quickly adapt their offers to users' behaviour and needs. Internet users, on the other hand, can easily and cheaply cherry-pick the best offer for the items they like.

Companies like Amazon, eBay, Google and Facebook almost exclusively rely on business models that provide direct contact between customers and users, bypassing layers of middlemen. Changes of this magnitude inevitably generate tensions between suppliers and distributors, as well as among competing distributors, especially when the margins to share are thin. Like previous retail innovations, e-commerce will lead to a rebalancing of powers in the supply chain.[5]

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[1] A provocative statement quoted by G. ACCARDO, "*Vertical Antitrust Enforcement: Transatlantic Perspectives on Restrictions of Online Distribution Under EU and U.S. Competition Laws"*, *European competition Journal*, August 2013, p. 225. (Subsequently: ACCARDO, *Vertical Antitrust Enforcement)*.

[2] B. GATES, *The Road Ahead*, Penguin Books USA, New York, 1995, Chapter 8, p. 157.

[3] On this point, see also A.L. SHAPIRO, *Digital Middlemen and the Architecture of Electronic commerce*, *24 Ohio Northern University Law Review*, 1998, p. 795; M. KENNEY, J. CURRY, *Beyond Transaction Costs: E-commerce and the Power of the Internet Dataspace*, Berkeley Roundtable on the International Economy (BRIE), E-conomy Project, 2000, available at http://fafs.uop.edu.jo/download/Research/members/internet_and_geography.pdf.

[4] European Commission, Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - *A coherent framework to boost confidence in the Digital Single Market of e-commerce and other online services*, COM (2011) 942, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0942:FIN:EN:PDF.

[5] See ACCARDO, *Vertical Antitrust Enforcement*, p.6.

The advantages of the Internet are unquestionable: first, for the consumers, who have the possibility of "*buying on line (...) without limitation in time, (of having) access to information of the products, (and the possibility of) comparing princes*"[6]"; secondly, for competition, which should benefit from the increased number of operators and services as well as from the resulting pressure of prices; lastly, for suppliers themselves, for whom the Internet is an opportunity to increase sales. [7]

On the other hand, this distribution system can affect companies having chosen selective distribution of luxury or high tech products, in order to safeguard brand image and to be protected from "free-riding" retailers.[8]

The restriction of online sales in distribution agreements is the new battleground in the suppliers–dealers relations. This is an area of competition law that raises familiar questions in a fast-moving and still largely developing context.

The European Court of Justice rendered on 13 October 2011 in the *Pierre Fabre* case a landmark ruling concerning the regime of online sales in the context of selective distribution, setting out the basis for the approach to be followed on similar issues arising in the future to the entire spectrum of distribution agreements. Although the Judgment was delivered in the framework of the former Vertical Block Exemption Regulation no.2790/1999, its findings remain valid under the new Block Exemption Regulation no.330/2010 and accompanying Guidelines on Vertical Restraints, which emphasize the distributors' ability in any type of distribution system to use the Internet.

The objective of this dissertation is to assess the consequences of *Pierre Fabre* on online sales in distribution agreements, in the current transition phase between a physical method of distribution and a mixed method of distribution combining physical sales and online sales.

The first chapter encompasses a brief overview of EU competition law applicable to distribution agreements and the presentation of the case at issue, describing all its stages from the decision of the French Competition Authority to the judgment of the Paris Court of Appeal rendered on 31 January 2013.

The second chapter focuses on the actual implications of the Judgment assessing, on the one hand, the extent of the general principle set by the Court of Justice[9]

of the prohibition to prohibit distributors from selling contract products online and, on the other hand, the means by which this kind of sales can be regulated and restricted even after such an outright ban.

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[6] Decision of the *Conseil de la concurrence* n. 08-D-25 of 29 October 2008 (*Pierre Fabre* case), point 82.

[7] R.SAINT-ESTEBEN, O.BILLIARD, K.A.JOUVENSAL, *On-line reselling and selective distribution networks: What can be learnt from the French experience?*, *Journal of Competition Law & Practice*, 2010, Vol.1, No.3, p. 246 (hereinafter SAINT-ESTEBEN, *On-line reselling and selective distribution networks).*

[8] This is a sensitive issue in countries which are exporters of high-quality products, such as France and Italy. SAINT-ESTEBEN, *On-line reselling and selective distribution networks* (above), p. 245-246. On the issue, see E. CLARK, M. HUGHES, D. WAELBROECK (Ashurst LLP), *Selective Distribution and Luxury Goods: The Challenge of the Internet?*, *Global Competition Policy Online Journal,* August 2009, available at www.globalcompetitionpolicy.org.;

T.BUETTNER, A.COSCELLI, T.VERGE', R.A.WINTER, *An Economic Analysis of the Use of Selective Distribution by Luxury Goods Suppliers*, *European Competition Journal*, Vol. 5, No. 1, April 2009 , pp. 201-226.

[9] The general ban set by the ECJ, actually, is a confirmation of the principle expressly stated in the new Vertical Guidelines, that every distributor must be allowed to use the Internet to sell its products.

I. *Pierre Fabre*: legal background and presentation of the case

The European Court of Justice rendered on 13 October 2011 in the *Pierre Fabre* case a milestone ruling following a referral by the Paris Court of Appeal regarding the regime of on-line sales in the context of selective distribution.[10].

Before moving to the core of the topic and discussing the case in detail, some background information about the EU competition law applicable to distribution agreements is helpful to contextualise the decision of the Court.

In the present perspective, the notion of "vertical restraints" is crucial. "Vertical restraints" are restraints of trade in agreements between producers and distributors and similar situations where the parties to the agreement are active on different levels of the value chain.[11]

In 1999, the European Commission passed a Regulation that listed the conditions under which vertical restrains of trade are exempt from the EU prohibition on anticompetitive agreements. [12]

On 20 April 2010, the Commission published the revised Block Exemption Regulation Applicable to Vertical Agreements (the VBER)[13] and Guidelines on Vertical Restraints (the Vertical Guidelines).[14]

The Commission mainly wanted to address the widespread use of the Internet as a modern distribution channel, the major development for competition law policy since the enactment of the old rules in 1999.[15]

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[10] For the concept of "selective distribution", see F. BORTOLOTTI, *Manuale di Diritto della Distribuzione: Concessione di vendita, Franchising e altri contratti di distribuzione; normativa antitrust; contratti internazionali di distribuzione* (2007), p.157; S. GAMBUTO, *Gli accordi di distribuzione*, in FRIGNANI, *Disciplina della concorrenza nella UE* (2013) p.732; V.AURICCHIO, M. PADELLARO, P. TOMASSI, *Gli accordi di distribuzione commerciale nel diritto della concorrenza* (2013) pp.423-502; M. IMBRENDA, *I contratti di distribuzione*, in A. CATRICALA', E. GABRIELLI, *I contratti nella concorrenza* (2011) p. 715; J. GOYDER, *EU Distribution law*, Oxford, (2011).

A distribution system is "selective" if (I) the supplier selects its distributors on the basis of specified criteria and (II) the distributors undertake not to re-sell to unauthorized distributors.

A supplier may wish to set up a selective distribution system to maintain greater control over the resale of its products. In such a system, the supplier agrees to supply only specified approved distributors who meet certain minimum criteria. In return, the distributors agree to supply only other distributors or dealers who are within the approved network, or end users. Such networks are often used by suppliers of luxury products, or technically complex products, to create a retail environment in which the quality and reputation of the products is maintained.

[11] Vertical agreements are defined by the Regulation 330/2010 as agreements "*entered into between two or more undertakings each of which operates, for the purposes of the agreement or the 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*" (Article 1(1)(a)). See also *Guidelines*, paras.24-25.

[12] Commission Regulation 2790/1999 of 22 December 1999 on the Application of Article 81(3) of the Treaty to Categories of Vertical Agreements and Concerted Practices, EC (1999) OJ L336/21.

(hereinafter, "1999 Regulation" or "1999 BER"), and accompanying Guidelines, Commission Notice – Guidelines on Vertical Restraints (2000) OJ C291/1 (hereinafter "2000 Guidelines")

[13] Commission Regulation 330/2010 of 20 April 2010 on the Application of Article 101(3) to Categories of Vertical Agreements and Concerted Practices, (hereinafter "VBER"). OJ L 102, 23.4.2010, pp.1-7. The VBER was established on 1 June 2010 and will be valid until 2022.

[14] European Commission Guidelines on Vertical Restraints, 2010, OJ C130/1 (hereinafter *Vertical Guidelines* or simply *Guidelines*).

[15] See Commission's press release IP/09/1197 of 28 July 2009, *Antitrust: Commission launches public consultation on review of competition rules for distribution sector*, available at http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1197&format=HTML&aged=0&language=EN&guiLanguage=en. For a brief summary of

1. The legal framework

1.1 EU Competition Law applicable to Distribution Agreements[16]

Article 101 of the Treaty on the Functioning of the European Union (TFEU) is the cornerstone of the legal framework for assessing vertical restraints.[17]

Article 101(1) TFEU prohibits agreements or practices that affect, by object or effect, trade between Member States and appreciably restrict or distort competition within the internal market.[18]An agreement that falls within the scope of Article 101(1) may, however, benefit from an individual exemption under Article 101(3) TFEU if it meets the conditions in Article 101(3) TFEU, thereby bringing about sufficient benefits or efficiencies to outweigh any anticompetitive effects.[19]

The VBER is the other fundamental EU legal source relevant in this context. The VBER provides a safe harbour, ensuring that restrictions in distribution agreements that fall within the VBER's coverage will not be found to infringe the EU competition law prohibition of restrictive agreements and, as a result, be unenforceable. But even if a distribution agreement does not benefit from this safe harbour, it may not necessarily fall under Article 101(1) TFEU, or it may fall under the exception in Article 101(3) TFEU.

In this regard, the Vertical Guidelines set out the Commission's framework for assessing vertical restraints under Article 101 TFEU, even where they do not fall exactly within the safe harbour provided by the VBER.[20]

Scope of application

The VBER and the Vertical Guidelines apply to vertical distribution agreements, that is, agreements between firms operating at different levels of the production or distribution chain for the sale and purchase of intermediate products and the purchase and resale of final products, such as agreements between a manufacturer and wholesaler or between a supplier and customer.[21]

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the process which led to the adoption of specific competition rules for online restraints, see ACCARDO, *Vertical Antitrust Enforcement*, p. 262.

[16] For a deeper understanding of the topic, see F.WIJCKMANS, F.TUYTSCHAEVER, *Vertical Agreements in EU Competition Law*, Oxford (2011); L. RITTER, W.D. BRAUN, *European Competition Law: A Practitioner's Guide*, The Hague (2004), Chapter IV, pp.263-380; R.WHISH, D.BAILEY, *Competition Law*, Oxford (2012); V.AURICCHIO, M. PADELLARO, P. TOMASSI, *Gli accordi di distribuzione commerciale nel diritto della concorrenza* (2013); A. FRIGNANI, *Disciplina della concorrenza nella UE* (2013); S. GAMBUTO, *Gli accordi di distribuzione* (above.no.10), p.732; M. IMBRENDA, *I contratti di distribuzione* (above no.10), p.680.

[17] Consolidated Version of the Treaty on the Functioning of the European Union Article 101, 5 September 2008, (2008) OJ C115 (hereinafter "Art 101 TFEU").

[18] The main aim for EU Competition Law is set out in Art 3(1)(b) TFEU: "*The Union shall have exclusive competence in (the following areas: (b) the) establishing of the competition rules necessary for the functioning of the internal market"*.

[19] According to Art. 101(3), in order to be individually exempt the agreement must: (i) contribute to production or distribution of goods or to promoting technical or economic progress, while (ii) allowing consumers a fair share of the resulting benefit, and while not (iii) imposing on undertakings restrictions that are not indispensable to the attainment of these objectives or (iv) allowing such undertakings the possibility of eliminating competition with respect to a substantial part of the products in question.

[20] The rules enshrined in the Vertical Guidelines are only legally binding on the Commission, while national competition authorities (NCAs) or national courts may, in principle, depart from such a soft-law instrument. Given the importance of the Commission's policy on Internet sales, it would have been appropriate to include the main provisions in the VBER, which, instead, is legally binding on NCAs and national courts.

[21] See Regulation 330/2010, Article 1(1)(a) and *Guidelines*, paras.24-25.

Like the previous rules, the new VBER and Vertical Guidelines apply to vertical agreements, where the market share threshold is met and the agreement or practice does not contain "blacklisted" hard-core restrictions.[22]

The main change to the scope of the VBER is that the benefit of the block exemption no longer depends only on the supplier's market share not exceeding 30%, but it depends also on the market share of the buyer not exceeding the same threshold.[23]

This "double market-share threshold" is an important novelty.[24]

The new policy framework, as outlined by the Commission, mirrors the idea that buyers, far from being passive, are increasingly able to exercise a certain amount of pressure on suppliers and that the "power struggle" going on within the supply chain can imply much more than a simple wealth transfer, as it could directly or indirectly distort the proper functioning of competition.[25]

Blacklist Approach

The VBER operates in the same way as the previous Block Exemption Regulation. Provided that they do not contain *"hardcore restrictions"* on competition, the VBER creates a presumption of legality for vertical agreements depending on the market share of the supplier and the buyer.[26]

[22] In practice, the VBER applies to vertical agreements between a supplier and a non-competing buyer, each holding a market share between 15 and 30%, when at least one of the parties to the contract is not a small- or medium-sized undertaking, and the agreement does not contain hard-core restraints. When the supplier and the buyer both have a market share below 15% or one party is a small- or medium-sized undertaking, then the agreement does not fall within the scope of application of Art 101(1) TFEU, provided the agreement does not contain provisions fixing resale prices or conferring absolute territorial protection on the parties or on third parties and provided that competition is not restricted in the relevant market by the cumulative effects of parallel networks of similar agreements established by several manufacturers or dealers (so-called agreements of minor importance). See *Commission Notice on Agreements of Minor Importance that do not Appreciably Restrict Competition under Art 101(1) TFEU*, (2001) OJ C368/13. Agreements between competitors are considered to be of minor importance when the parties' aggregate market share does not exceed 10%. When parallel networks of similar agreements are implemented in the relevant market, then the market share threshold below which an agreement is considered of minor importance is reduced to 5% (down from 15 and 10%, respectively).

[23] VBER, *above*, Art 3.1: "*The exemption provided for in Article 2 shall apply on condition that the market share held by the supplier does not exceed 30% of the relevant market on which it sells the contract goods or services and the market share held by the buyer does not exceed 30% of the relevant market on which it purchases the contract goods or services"*.

[24] See N. PETIT, D. HENRY, "*Vertical Restraints under EU Competition law: conceptual foundations and practical framework",* December 13, 2010, p.30. Available at SSRN: http://ssrn.com/abstract=1724891

[25] See ACCARDO, *Vertical Antitrust Enforcement* (above no.1), p.267. Some economists argue that, if the need to take greater account of buyer-driven vertical restraints should be approved, then the 30% market share threshold would be quite an inadequate means to deal with the anticompetitive effects of demand-led vertical restraints. According to the more recent economic thinking, even when the market share of the buyer is well below the levels at which supply led vertical restraints start raising concerns in accordance with the VBER, anticompetitive effects cannot be excluded. Therefore, for example, dealers with relatively insubstantial market share still gain considerable leverage from their ability to substitute other brands. See P.W. DOBSON, "*Buyer-Driven Vertical Restraints*" in *The Pros and Cons of Vertical Restraints* (Swedish Competition Authority, November 2008), available at http://www.kkv.se/upload/Filer/Trycksaker/Rapporter/Pros&Cons/rap_pros_and_cons_vertical_restraints.pdf ; see also S. VEZZOSO, "*Une Perspective Économique Évolutionniste a l'Égard des Restrictions Verticales*", *Revue Internationale de Droit Économique,* 2008, p. 315.

[26] See *Vertical Guidelines*, *para.* 23. "*hardcore restriction*" is a different legal concept than "*restriction by object*", which is a restriction on competition for which anticompetitive effects can be presumed in order to

The VBER blacklists five hard-core restraints:

I. resale price maintenance (RPM);
II. territorial and customer restrictions;
III. restrictions to sell to end-users imposed on retailers in a selective distribution system;
IV. restrictions on cross-supplies within a selective distribution system;
V. restrictions on component suppliers to sell the components they produce to independent repairers or service providers.[27]

An agreement which includes *"hardcore restrictions"* cannot benefit from the VBER, regardless of the parties' market share, and it will be presumed to have actual or likely negative effects on competition, as well as to not have positive effects that fulfill Article 101(3) TFEU.[28]

1.2 Limiting online sales under EU competition rules[29]

The 1999 Regulation did not provide a detailed guidance on when vertical agreements relating to sales over the Internet might be exempt from the general prohibition.[30]This led

establish its anticompetitive nature. This issue will be discussed in the present Chapter, para.2.2. *"hardcore restrictions"* are serious restrictions on competition that would, in most cases, be prohibited due to the harm they cause to consumers. A *hardcore restriction* may, in exceptional cases, fall outside the scope of Art 101(1) altogether, when such a restriction is objectively necessary for the existence of an agreement of a particular type or nature. On the difference between the concepts of "*restriction by object*" and "*hardcore restriction*", see the Opinion of Advocate General Mazak of 3 March 2011, C-439/09 P *Pierre Fabre Dermo-Cosmétique SAS/Président de l'Autorité de la concurrence, Ministre de l'Économie, de l'Industrie et de l'Emploi*, point 29, *European Court Reports 201, Page I-09419.*

The Vertical Guidelines provide some examples for restrictions that may fall outside the scope of Art 101(1) or may be individually exempt under Art 101(3). See *Guidalines*, paras 60-64.

[27] The scope of the blacklist is very broad. Art 4 of the VBER, however, provides for several exceptions dealing with restrictions that, although in principle falling within the blacklist, are not considered to have the object or effect of restricting competition. This paper, in Chapter II, examines mainly the restrictions of online sales under (ii) restrictions to sell to end-users imposed on retailers in a selective distribution system, as it is the one discussed in *Pierre Fabre* case.

[28] This double presumption is, however, contestable. The burden of proof rests on the party, or the authority, alleging the infringement of Art 101(1) TFEU or of any of the relevant provisions of the VBER. See ACCARDO, *Vertical Antitrust Enforcement* (above no.1), p.269.

[29] This issue will be examined in greater detail in Chapter II, discussing about selective distribution and online sales under the EU Regulation and case law, both at European and national level.

[30] Actually, the 2000 Guidelines mentioned the issue (Guidelines on Vertical Restraints, OJ C 291 13.10.2000, para.55 subs.), but they did not contain much language about online sales. See WIJCKMANS, TUYTSCHAEVER, *Vertical Agreements in EU Competition Law*, Oxford, 2011, p. 228. Essentially, the 2000 Guidelines contained four basic principles applicable to online distribution, which continue to apply under the regime of Regulation 330/2010:

As a rule, online promotion and sales are a form of passive sales (para.50). Accordingly, every distributor must be free to use the Internet to advertise or to sell products (para.51), and the supplier cannot reserve Internet promotion or sales of its products for itself after having appointed one or several independent distributors.

As an exception to the rule, online promotion and sales can be active sales into other distributors' exclusive territories or to their exclusively allocated costumer groups.

Quality standards for the use of the Internet may be imposed by the supplier to its distributors, particularly (but not exclusively) in the case of selective distribution.

An outright ban on the use of the Internet by distributors is possible only if there exists an objective justification for such a ban. (para.51).

to a considerable degree of uncertainty for suppliers as to the extent to which they could place restrictions on their distributors' ability to re-sell their goods through the internet.[31]

The new Block Exemption Regulation and Guidelines go some way towards addressing this uncertainty: they are clear that the basic position in the assessment of whether a vertical agreement relating to internet sales might be anti-competitive is that every distributor must be allowed to use the Internet to sell its products. [32]

The new Guidelines strike a compromise between the opposing interests of on-line commercial platforms and luxury goods producers.[33]

On the one hand, they confirm that an outright prohibition to sell or advertise a product over the Internet is a hardcore restraint that would deprive the agreement of the safe harbor granted by the Regulation.[34]

The Guidelines also clarify that restrictions on how a distributor can sell through the Internet are hardcore restraints if they limit the distributor's ability to make passive sales.[35]

On the other hand, the Guidelines state that an outright ban on Internet sales may be objectively justified in exceptional circumstances, such as when necessary to align on a public ban on selling dangerous substances to certain customers for reasons of safety or health. In addition, undertakings have always the possibility to plead an "*efficiency defence"* of Internet sales *"hardcore restrictions"*.[36].

Finally and most importantly, the Guidelines clarify that a supplier may impose quality standards for the use of an Internet site and, in particular, *"require its distributors to have one or more brick and mortar shops or showrooms as a condition for becoming a member of its distribution system".*[37]

"The quality standards, however, must be proportionate, that is, they should be "*overall equivalent to the criteria imposed for the sales from the brick and mortar shop*"[38]*"* and should not consist of obligations that "*dissuade appointed dealers from using the internet to reach more and different customers*".[39]

Thus, the current core of the Commission's policy on online distribution of products may be summarized as follows:

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[31] For a comparison between the previous Regulation and the new VBER and Guidelines, see F.AMATO, "*Internet Sales and the New EU Rules on Vertical Restraints*", *Competition Policy International Antitrust Journal,* June 2010, p.4 ss.

[32] *Vertical Guidelines*, paragraph 52.

[33] F. AMATO, "*Internet Sales and the New EU Rules on Vertical Restraints*" (above), p. 9.

[34] *Guidelines*, para. 52.

[35]*Guidelines*, para. 50. The *Guidelines* provide the following examples of Internet sales restrictions that are considered hardcore: (I) requiring the distributor to make its website inaccessible, or transactions through its website impossible, to customers depending on their place of residence; (II) requiring a distributor to limit the proportion of overall sales made over the internet (without excluding, however, the possibility for the supplier to require the buyer to sell at least a certain absolute amount, in value or volume, of the products off-line to ensure an efficient operation of its brick and mortar shop); (III) requiring a distributor to pay a higher price for products intended to be resold by the distributor online than for products intended to be resold off-line.

[36] *Guideline*s, para. 60. For instance, requiring a distributor to pay a higher price for products intended to be resold by the distributor on-line than for products intended to be resold off-line may be justified if the sales on-line lead to substantially higher costs for the manufacturer than sales made off-line (*Guidelines,* paragraph 64).

[37] *Guidelines*, para. 54.

[38] *Guidelines*, para. 56.

[39] *.Ibidem.*

•it is forbidden to prevent distributors from using the Internet to sell products;[40]

•online sales are generally considered to be "passive sales", meaning responding to unsolicited requests from individual customers,[41]which suppliers cannot restrict in principle;[42]

•online sales may be restricted only in the limited cases where they are made in such way that they qualify as active selling into territories or customer groups reserved or allocated to other distributors;[43]

•suppliers may regulate online sales by subjecting them to certain proportionate quality standards,particularly in the context of selective distribution; [44]

•in limited circumstances, outright prohibitions on internet sales may qualify for an individual exemption under Article 101(3) TFEU.[45]

The Vertical Guidelines, however, are not exhaustive, and developments in online technologies will in practice likely test the rather general criteria contained therein. In this scenario, case law as means of interpretation becomes fundamental. The *Pierre Fabre* case constitutes an important step towards this direction.

2. Description of *Pierre Fabre* case

2.1. Facts and procedure

Pierre Fabre Dermo Cosmetique (PFCD) is a company dedicated to the production and distribution of cosmetics and body hygiene products. It operates in the market through several subsidiaries, selling products on both the French and the European markets. In 2007, the *Pierre Fabre* group had 20 per cent of the French market for those products, not classified as medicines.[46]

[40] *Guidelines*, para. 52.

[41] *Guidelines*, para. 51. Conversely, "active sales" mean actively approaching individual customers or a specific customer group or customers in a specific territory.

[42] *Ibidem.*

[43] *Guidelines*, para. 53

[44] *Guidelines*, para. 56.

[45] *Guidelines*, para. 60.

[46] At the time, France prohibited the sale of prescription medicines and of "Over The Counter" (OTC) medicines, a kind of non-prescription medicines, on the Internet. Even if the European legislation did not prohibit the selling via the Internet for those products, Article 14 of the European Directive on distance selling (*Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts,* OJ 1997 L 144, p. 19) made it possible for Member States to prohibit on-line sales of medicines themselves. Nowadays, the French legislation has changed. The Decree of 20 June 2013 regarding good practices for online dispensing of medicines ("*Arrêté relative aux bonnes pratiques de dispensation des médicaments par voie électronique*") sets out the practical guidelines for the online sale of non-prescription medicines. Now, all non-prescription medicines can be sold online in France, according to a decision the Council of State ("*Conseil d'Etat*") of 14 February 2013. On this aspect, it is important to report that France aligned itself to the new European policy. In July 2011, in fact, the EU strengthened the protection of patients and consumers by adopting a new Directive on falsified medicines for human use (*Directive 2001/83/EC of the European Parliament*). This Directive aimed to prevent falsified medicines entering the legal supply chain and reaching patients. It introduced harmonized safety and strengthened control measures across Europe by applying new measures, regarding also supply chain and good distribution practice. The European Commission issued final revised Good Distribution Practices guidelines on 8 March 2013 (*Guidelines of 7 March 2013 on Good Distribution Practice of Medicinal Products for Human Use*) , designed to incorporate the requirements of the 2011 Directive. These guidelines took effect in September 2013.

Despite that, *Pierre Fabre* signed distribution agreements for those products (*Klorane, Ducray, Galénic* and *Avène* brands) requiring that:

1. its authorized distributors must supply evidence that there will be physically present at its outlet at all times during opening hours at least one specially trained person;
2. the person in question must have a degree in Pharmacy awarded or recognized in France;
3. the authorized distributor must undertake to dispense the products only at a marked, specially allocated outlet.[47]

Such a contractual clause excluded *de facto* all forms of selling by the Internet.

Decision of the French Competition Authority

On 29 October 2008 the French Competition Authority, *Autorité de la concurrence* (NCA), decided that the selective distribution agreement between *Pierre Fabre* and pharmacies, requiring the presence of a pharmacist for the selling, was anti-competitive under French and EU Competition Law.[48]

In the hearing before the NCA, PFDC explained that since its products were developed as healthcare products, their use required advice from a qualified pharmacist and online selling would not meet customers' expectations.[49]

In its decision, the NCA found that the *de facto* ban on internet sales necessarily had the object of restricting competition, in addition to the limits on competition inherent to the selective distribution system.[50]Following its finding of the *restriction by object* and taking into account that PFDC's market share did not exceed 30%, the NCA examined whether the specified practices could be exempted under the 1999 Regulation. The NCA found that, although the practice of prohibiting Internet selling was not expressly referred to in that regulation, the ban on internet sales was equivalent to a ban on active and passive sales, constituting a "*hardcore restriction*" under Article 4(c) of the 1999 BER.[51]

In relation to the possibility of an individual exemption under Article 101(3) TFEU (Article 81(3) EC[52]), the NCA held that PFDC had failed to demonstrate economic progress or that the restriction was indispensable in circumstances making it eligible for such exemption.[53] In response to PFDC's argument concerning the need of the physical presence of pharmacist for consumers' well-being, the NCA noted that the products in

[47] ECJ, C- 439/09 *Pierre Fabre Dermo-Cosmétique SAS/Président de l'Autorité de la concurrence, Ministre de l'Économie, de l'Industrie et de l'Emploi,* 13 October 2011, para. 13 (hereinafter "ECJ, *Pierre Fabre"*).

[48]*Autorité de la concurrence,* Decision No. 08-D-25 of 29 October 2008 (Pierre Fabre Dermo-Cosmetique), available at http://www.autoritedelaconcurrence.fr/pdf/avis/08d25.pdf. See J.GOYDER, *The French NCA sanctions the prohibition of Internet sales imposed on the members of a selective distribution network, under Art. 81.1 EC (Pierre Fabre Dermo-Cosmétique)*, 29 October 2008, e-Competitions, No. 22891; O. ANCELIN, C. SAUMON, *The French NCA fines a cosmetics manufacturer for prohibiting its selective distributors from selling its products on the Internet (Pierre Fabre Dermo-Cosmétique),* 29 October 2008, e-Competitions, No. 22998.

[49] Opinion of Advocate General Mazak of 3 March 2011, C-439/09 P *Pierre Fabre Dermo-Cosmétique SAS/Président de l'Autorité de la concurrence, Ministre de l'Économie, de l'Industrie et de l'Emploi* (hereinafter "AG Opinion"), point 7, *European Court Reports 201, Page I-09419.*

[50] ECJ, *Pierre Fabre*, (above), para. 19. For some remarks on the NCA's reasoning, see also SAINT-ESTEBEN, *On-line reselling and selective distribution networks* (above), p. 247.

[51] ECJ, *Pierre Fabre*, para. 20.

[52] Treaty Establishing the European Community, OJ C 340, 10.11.1997 (hereinafter "EC" or "EC Treaty")

[53] AG Opinion, point 12.

questions were not medicines, so their distribution was free,[54]and referred to *Deutscher Apothekerverband* case[55]where the ECJ refused to accept similar arguments in case of a ban on internet sales of non-prescription medicines and contact lenses.

Thus, the agreement was not capable of being individually exempted. As a result, PFDC was ordered remove from its selective distribution contracts all terms that were equivalent to a ban on internet sales of its cosmetics and personal care products and to make express provision in its contracts for an option for its distributors to use that method of distribution.[56]

Amicus curiae brief of the Commission before the Paris Court of Appeal[57]

In its amicus curiae brief before the Paris Court of Appeal,[58] the Commission considered that any general and absolute ban on selling contract products to end-users via the Internet, imposed by the supplier on its authorized distributors in the context of a selective distribution network, constituted a *hardcore restriction* of competition by object within the meaning of Article 81 EC (Art. 101 TFEU), regardless of the market share held by the supplier.[59] After clarifying that any restriction of sales, whether active or passive, constituted an a *hardcore restriction*,[60] and that the agreement at issue could not be block exempted under the 1999 Regulation[61] but was capable of being individually exempted under Article 81(3) EC (Article 101(3) TFEU),[62]the Commission invited the *Cour d'Appel* to refer for a preliminary ruling if doubts on interpretation persisted.[63]

Proceeding in front of the Appeal Court

On 24 December 2008 *Pierre Fabre* challenged the NCA's decision before the *Cour d'Appel* de Paris, the French Appeal Court, claiming that the NCA had erred in law by finding that the selective distribution agreements were necessarily anticompetitive and constituted an anticompetitive *restriction by object*. According to PFDC such a finding was at odds with the general trend in competition law. PFDC asserted that the NCA had committed a manifest error of assessment by denying the specified practices the benefit of the block exemption under the 1999 BER and individual exemption under Article 101(3) TFEU.

The Appeal Court decided to stay the proceeding and referred the following questions for a preliminary ruling to the ECJ:

[54] ECJ, *Pierre Fabre*, para. 24

[55] ECJ of 11 December 2003, C-322/01 *Deutscher Apothekerverband e.V. _ 0800 DocMorris NV and Jacques Waterval*, paras. 106, 107, 112, concerning restrictions on the distribution of non-prescription medicines via the Internet.

[56] *Pierre Fabre* was also ordered to pay a fine of 17000 € (ECJ, *Pierre Fabre*, para. 27).

[57] The European Commission had intervened in this matter pursuant to article 15(3) of Regulation (EC) no. 1/2003 relating to cooperation with national courts, which provides that "*where the coherent application of Article 81 or Article 82 of the Treaty so requires, the Commission, acting on its own initiative, may submit written observations to courts of the Member States*."

[58]*Observations de la Commission des Communautes Europeennes en application de l'Article 15, paragraphe 3 du Reglement n° 1/2003 dans l'affaire Pierre Fabre*. Intervention dated 11 June 2009, available at http://ec.europa.eu/competition/court/amicus_2009_pierre_fabre_fr.pdf. (hereinafter "*Commission observations*").

[59] *Commission observations,* para.11.

[60] *Ibidem.*

[61]*Ibidem,* para.19.

[62]*Ibidem,* para. 21.

[63]*Ibidem*, para. 23.

- is a general and absolute ban on internet sales to end users in the context of a selective distribution agreement anti-competitive under Article 101(1), being in fact a *"hardcore restriction of competition by object for the purposes of Article 101(1), which is not covered by the block exemption"*,[64]and therefore not exempt under the VRBE?; and, if so
- could the agreement still benefit from individual exemption under Article 101(3)?[65]

2.2. Court of Justice's preliminary ruling

The Court specified that the question referred for a preliminary ruling should be understood as seeking to ascertain,

1. whether the contractual clause at issue in the main proceedings amounted to a restriction of competition "by object" within the meaning of Article 101(1) TFEU
2. whether a selective distribution contract containing such a clause may benefit from the block exemption
3. whether, if the block exemption is inapplicable, the agreement could nevertheless benefit from an individual exemption under Article 101(3) TFEU.[66]

"Restriction by object" and "hardcore restriction": a preliminary issue

In an attempt to remedy a certain degree of confusion concerning the terminology of the referred question, the Court preliminarily underlined that neither Article 101 TFEU nor Regulation No 2790/1999 refer to the concept of "*hardcore restriction*" of competition.[67]

Advocate General Mazak in his Opinion argued that "*restriction by object*" and "*hardcore restriction*" should be viewed as two distinct legal concepts.[68]

The notion of "*restriction by object*" is included in the formula for qualifying an agreement or practice as an infringement pursuant to Article 101(1) TFEU. Once an anticompetitive object was established it was no longer necessary to examine the effects on competition. As the ECJ stated in GSK case, the anticompetitive object and effect of an agreement are not cumulative but alternative conditions for assessing whether such an agreement comes within the scope of Article 101(1) TFEU.[69]

[64] ECJ, *Pierre Fabre*, para. 31

[65] *Ibidem*. See DEBROUX, *Internet distribution – Preliminary ruling: The Paris Court of Appeal requests a preliminary ruling from the ECJ on the issue of whether the absolute ban on internet distribution, imposed by suppliers distributors, represents hardcore vertical restraints (Pierre Fabre Dermo-Cosmétiques*), february 2010, e-Competitions, No. 30318.

[66] ECJ, *Pierre Fabre*, para. 32.

[67] ECJ, *Pierre Fabre*, para. 32. The new Regulation, instead, expressively mention "hardcore restriction" in the heading of Article 4. On the issue about the difference between "restriction by object" and "hardcore restriction", see A.SVETLICINII, *"Objective justification of "Restriction by Object" in Pierre Fabre: a more economic approach to Article 101(1) TFEU?"*, *European Law Reporter*, n.11, 1 November 2011, p.348-352 (Hereinafter SVETLICINII, *Objective justification of "Restriction by Object" in Pierre Fabre)* Available at SSRN: http://ssrn.com/abstract=1991330.

[68] AG Opinion, point 24.

[69] ECJ of 6 October 2009, Joined cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services _ Commission*, para.55. See also ECJ of 30 June 1966, C-56/65 *Société Technique Minière (L.T.M.) _ Maschinenbau Ulm GmbH (M.B.U.)*, para. 249.

In the same judgment, the Court noted that in establishing an anticompetitive object, regard should be made to the content of the agreement, to its purpose and its economic and legal context.[70]

The concept of "*hardcore restriction*", expressed by the Commission in several occasions as part of its policy,[71] can be also found in 2000 Vertical Guidelines, which state that Article 4 of the 1999 BER contains the list of the *"hardcore restrictions"* which lead to the exclusion of the vertical agreement from the scope of application of the 1999 BER.[72]
As the ECJ held in *Pedro IV Servicios*, "*where an agreement does not satisfy all the conditions provided for by an exempting regulation, it will be caught by the prohibition laid down in (Article 101(1) TFEU) only if its object or effect is perceptibly to restrict competition within the common market and it is capable of affecting trade between Member States*".[73]
According to AG Mazak, *Pedro IV Servicios* suggested that the fact than an agreement might contain a "*hardcore restriction*" in the sense of the 1999 BER, did not automatically mean that it should be also considered a "*restriction by object*" within the meaning of the Article 101 TFEU.[74]

Restriction "by object" within the meaning of Article 101(1) TFEU

The Court pointed out that, in the context of a selective distribution system, a contractual clause requiring sales of cosmetics and personal care products to be made in a physical space where a qualified pharmacist must be present, resulting in a *de facto* ban of online sales, constitutes a "*restriction by object"* under the meaning of Article 101 TFEU,

[70] AG Opinion, point 25. See also ECJ, *Pierre Fabre*, para. 34. Reference is made to ECJ of 6 October 2009, C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services _ Commission*, para. 58; ECJ of 6 April 2006, C-551/03 P *General Motors _ Commission*, para. 66; and ECJ of 4 June 2009, C-8/08 *T-Mobile Netherlands BV and Others _ Raad van bestuur van de Nederlandse Mededingingsautoriteit*, para.31.

[71] In the *Commission's Glossary of terms used in EU Competition policy,* "hardcore restrictions" are defined as "*restrictions of competition by agreements or business practices, which are seen by most jurisdictions as being particularly serious and normally do not produce any beneficial effects. They therefore almost always infringe competition law.* " (See Directorate-General for Competition, *Commission's Glossary of terms used in EU Competition policy - Antitrust and control of concentration*, Brussels, July 2002, p.22, available at http://ec.europa.eu/competition/publications/glossary_en.pdf). See also *Commission Notice on Agreements of Minor Importance that do not Appreciably Restrict Competition under Article 81(1) of the Treaty establishing the European Community (de minimis Notice),* OJ C 372, 9.12.1997, p.13 as well as the new *Commission De minimis Notice* of 2001,OJ C 368*,* 22.12.2001.

[72] Commission Notice Guidelines on Vertical Restraints (2000/C 291/01), para. 46. The notion of "*hardcore restriction*" is present also in the new Guidelines, paras 47-64, and in the 2010 Regulation, in the heading of Article 4.

[73] ECJ of 2 April 2009, C-260/07 *Pedro IV Servicios SL _ Total España SA*, para. 68.

[74] Some practitioners, however, noted that the ECJ's judgment suggested that the concepts of "restriction by object" and "hardcore restriction", in practice, mean the same thing. While both the referring court and AG *Mazak* made distinctions between the two concepts, the ECJ literally noted that neither Article 101 TFEU nor the 1999 BER refer to the concept of "hardcore restriction" and interpreted the question of the national court as only referring to "restrictions by object". See i.e. WHITE&CASE, *A general and absolute ban on Internet sales in the context of a selective distribution network constitutes a restriction of competition "by object"*, October 2011, available at http://www.whitecase.com.

unless that clause is *objectively justified*[75]taking into account the content and objective of that contractual clause and the legal and economic context of which it forms a part.[76]

The ECJ recalled that, under its well settled case law on selective distribution, [77]those objective justifications are deemed to occur when certain conditions are met:

1. resellers must be chosen on the basis of objective criteria of qualitative nature, laid down uniformly for all potential resellers, and not applied in a discriminatory manner;
2. the characteristics of the contract products necessitate such a distribution network in order to guarantee their quality and proper use, and
3. the criteria set forth do not go beyond what is necessary.[78]

In the case at issue, the EU Court did not dispute that the PFDC's resellers have been chosen following an objective criteria of a qualitative nature, laid down uniformly for all potential resellers. Nevertheless, the EU Court proceeded to analyze whether these provisions complied with the other requirements, in particular as to whether the restrictions pursue a legitimate objective.[79]

The EU Court rejected the argument raised by PFDC as to which the products concerned required individual advice from a pharmacist to ensure their correct use and the protection of the image of brand of non-prescription cosmetics was a legitimate objective justifying a competition restriction under Article 101(1) TFEU.

As a result, the contractual clause at issue amounted to a restriction of competition "by object" within the meaning of Article 101(1) TFEU.[80]

The EU Court then provided guidance to the *Cour d'Appel* as to whether block exemption Regulation or individual exceptions under Article 101(3) TFEU were applicable to this case.

The possibility of a block exemption

As to the block exemption, the Court recalled that Article 4(c) of the 1999 Block Exemption Regulation[81]provides that the exemption does not apply to vertical agreements which directly or indirectly restrict active or passive sales to end consumers by members of a selective distribution system, without prejudice to the possibility of prohibiting a

[75] This expression, used by the ECJ for the first time in the context of art.101(1), was present in 2000 Guidelines, paras.49 and 51. It can be interpreted considering the AG Opinion (see from point 31, *"objective justification"*), and the paragraph 60 of the *Vertical Guidelines*, which provides that "*Hardcore restrictions may exceptionally be objectively necessary for the existence of an agreement of a particular type or nature and fall outside Article 101(1), such as when necessary to align on a public ban on selling dangerous substances to certain customers for reasons of safety or health*."

Therefore, the notion of *"objective justification"* may be equivalent to the exceptional circumstances where a restriction may be objectively "necessary" (and hence "justified"). See SVETLICINII, *Objective justification of "Restriction by Object" in Pierre Fabre* (above), p. 351.

[76] ECJ, *Pierre Fabre*, para. 35-39.

[77] ECJ C-107/82 *AEG-Telefunken* v *Commission* (1983) ECR 3151, para. 33; C-26/76 *Metro SB−Großmärkte* v *Commission* (1977) ECR 1875, para. 20, and C-31/80 *L'Oréal* (1980) ECR 3775, paras 15 and 16. These conditions are also included in the *Vertical Guidelines*, para.185.

[78] ECJ, *Pierre Fabre*, para. 41.

[79] ECJ, *Pierre Fabre*, para. 43.

[80] ECJ, *Pierre Fabre*, paras. 44-46.

[81] The same in the new Regulation.

member of the selective system from operating out of an "*unauthorised place of establishment"*.[82]

The ECJ considered that the *de facto* prohibition of online sales at issue would result to a restriction of passive sales to end consumers wishing to buy online.[83]

It also rejected the interpretation according to which internet has to be taken as a "*place of establishment"*, since this expression only refers to outlets where the products are sold directly to end consumers.[84]

Therefore, the *de facto* prohibition of online sales would result in an "*hardcore restriction"*, and in the loss of the benefit of the block exemption under Article 4(c) of the 1999 Regulation.[85]

The possibility of an individual exemption under Art. 101(3)

The ECJ held that such a contract may still benefit, on an individual basis, from the legal exception provided for in Article 101(3) TFEU if the required conditions are met. Due to the lack of information, the EU Court did not provide any guidance to the *Cour d'Appel* as regards to the assessment of the these conditions in the case at issue.[86]

2.3. *Cour d'Appel* ruling

On 31 January 2013 the Paris Court of Appeal delivered a judgment following the EU Court's response on its preliminary ruling and ruled on the individual exception applicability.[87]

First of all, the *Cour d'Appel* admitted that clause in PFDC's selective distribution agreements constitute a *de facto* ban of the selling via the internet, and the ban of online selling was integral part of the these agreements. The Appeal Court remarked that the legitimacy of that selective distribution contract was never challenged by the decision of the French Competition Authority.[88]

The *Cour d'Appel* rejected PFDC's claim as regards the individual exception of Article 101(3) TFEU. The criteria laid down therein are

- the efficiency gains, meaning that the agreement constitutes an improvement in the production or distribution of goods or in technical or economic progress;
- the fair share for consumers of the resulting benefit;
- the indispensability of the restriction for the achievement of these objectives;
- the absence of elimination of competition in respect of a substantial part of the product markets concerned.

The Court rejected the claims brought forward by PFDC insofar as it considered that two of these criteria were not met.

[82] ECJ, *Pierre Fabre*, para. 53.
[83] ECJ, *Pierre Fabre*, para. 54.
[84] ECJ, *Pierre Fabre*, para. 56.
[85] ECJ, *Pierre Fabre*, paras. 55-58.
[86] ECJ, *Pierre Fabre*, paras 48-50 and 57. Given the harshness of the conditions set down by the judgment, however, the possibility of benefitting from the individual exemption is limited to exceptional circumstances, as it has been confirmed in the Ruling of the Paris Court of Appeal.
[87] *Cour d'Appel de Paris* (Pole 5), Arret du 31 Janvier 2013 dans l'affaire *Pierre Fabre Dermo-Cosmetique/Autorite de la Concurrence*, available at http://ec.europa.eu/competition/court/amicus_2009_pierre_fabre_judgment2_fr.pdf
[88] *Cour d'Appel de Paris*, Arret du 31 Janvier 2013 dans l'affaire *Pierre Fabre* (above), p.12.

First, as regards the indispensable nature of the restriction, the *Cour d'Appel* stated that the applicant shall establish that a ban on internet sales would be necessary so that the client would receive the best possible personalized advice and that, in the absence of such a ban, the quality of the advice that the client could get, would be substantially reduced. Thus, the Court determined that PFDC's selective distribution agreement imposed restrictions which, given the nature of the product, were not indispensable to guarantee consumers a personalized quality service advice.[89]The *Cour d'Appel* ruled that, by having the possibility of acquiring the products on-line, the client would I) have all the necessary information available, including detailed instructions of use, II) be able to cross-check with other information contained in similar products, III) be able to obtain advice via e.g. hotline service.[90]

Secondly, the *Cour d'Appel* considered that the requirement as to the contribution to improve production or distribution, or promoting technical or economic progress, was neither met.

With specific reference to the improvement of the distribution, PFDC failed to show that online sales increase the risk of counterfeiting and that its products are less exposed to this risk compared to competing products which are sold via internet. It did not show either that consumers were fully informed of the Internet sales ban. Accordingly, it could not be excluded that clients were able to distinguish between genuine products sold in outlet and those sold online and allegedly counterfeit.[91]

In light of all these reasons, the *Cour d'Appel* concluded that the PFDC's contractual clause establishing the *de facto* internet sales ban could not benefit from the individual exemption laid down Article 101(3) TFUE.[92]

Therefore, it dismissed the appeal and ordered PFDC to pay the costs.

II. Consequences of *Pierre Fabre* on Internet Distribution

"*Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.*"[93](Justice Brandeis, 1918)

The *Pierre Fabre* case shows that the European Court of Justice seems to favour a legal, formal approach founded on the characterization of the restriction, which creates a per se prohibition regardless of the effects of the practices.[94]

[89] *Ibidem*, p.18.
[90] *Ibidem*, p.19.
[91] *Ibidem*, p.20.
[92] *Ibidem*, p.22.
[93] *Board of Trade of Chicago v. United States*, 246 U.S. (1918). Statement quoted by Alexander Italianer, Director General for Competition, European Commission, in *Competitor Agreement under EU Competition Law*, 40th Annual Conference on International Antitrust Law and Policy, Fordham Competition Law Institute New York, 26 September 2013, available at http://ec.europa.eu/competition/speeches/text/sp2013_07_en.pdf.
[94]See L.VOGEL, "*EU Competition Law Applicable to Distribution Agreements: Review of 2011 and Outlook for 2012*", *Journal of European Competition Law and Practice*, April 2012, p. 235 (hereinafter L.VOGEL, *EU Competition Law Applicable to Distribution Agreements*)

This traditional vision may be opposed to the new empirical and economics-based approach, focused mainly on the effects adopted in the "new generation" Block Exemption Regulations and Guidelines.[95]

Before going any further in assessing the judgment, it is important to underline its effects on online distribution. *Pierre Fabre*, indeed, provides a practical guidance on the evaluation of anticompetitive restraints of online sales in the context of selective distribution systems, and it is the first European case confirming the general prohibition to prohibit Internet sales clearly stated in the new Guidelines.

Even if the ECJ ruling is very recent, it is already possible to see its influence on the administrative doctrine and on French case law.[96]

In the judgment of 31 January 2013,[97]following the judgment of the ECJ, the Paris Court of Appeal strictly applied the European court's assessment of the anticompetitive object of the clause forbidding Internet sales.

On 18 September 2012 the French Competition Authority issued an opinion[98]aimed, first, at assessing the intensity of competitive pressure exerted by e-commerce on the traditional means of distribution and, second, at identifying the obstacles to its development. In this regard, NCA noted that suppliers apply different prices in offline and online distribution channels which could distort the play of competition.[99]

The NCA considered that this could have the effect of slowing down the development of online distribution.[100]

It reiterated in detail the reasoning of the *Pierre Fabre* judgment handed down by the ECJ and in its Decision on that case,[101]qualifying the prohibition of online sales as a restriction of competition by object.[102]

Moreover, the French Competition Authority also found Bang & Olufsen guilty on the same grounds of *Pierre Fabre* in a decision rendered on 12 December 2012.[103]

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[95] See, for example, D. GERADIN, A. LAYNE-FARRAR, N. PETIT, *EU Competition Law and Economics*, Oxford, 2012; N.VETTAS, *"An economics approach to the new rules for vertical restraints"*, Chapter IV, pp. 105-121, in *Reviewing Vertical Restraints in Europe: Reform, Key Issues and National Enforcement*, edited by Jean-François Bellis and José Maria Beneyto, Brussels, 2012; LEAR (Laboratorio di Economia, Antitrust, Regolamentazione), *Vertical Restraints in Electronic Commerce: an economic perspective*, *Lear Competition Note*, May 2013, available at http://www.learlab.com/pdf/lcn_vrs_e_commerce_2305_final_1369323120.pdf (hereinafter "LEAR, *Vertical Restraints in Electronic Commerce: an economic perspective"*)

[96] See L. VOGEL, *Efficiency vs Regulation: the Application of EU Competition Law to Distribution Agreements in 2012 and Outlook for 2013*, in *Journal of European Competition Law and Practice*, May 2013, p. 277-288, p.282 (hereinafter "L.VOGEL, *Efficiency vs Regulation*")

[97] *Cour d'Appel de Paris* (Pole 5), Arret du 31 Janvier 2013 dans l'affaire *Pierre Fabre Dermo-Cosmetique/Autorite de la Concurrence* (above).See Chapter I, para.2.3, *Cour d'appel ruling.*

[98] *Autorité de la concurrence*, Opinion No. 12-A-20 of 18 September 2012 concerning how competition operates in the e-commerce sector, available at http://www.autoritedelaconcurrence.fr/pdf/avis/12a20.pdf. (Hereinafter "NCA Opinion on the e-commerce").

[99] NCA Opinion on the e-commerce, paras.27 subs., 96.

[100] *Ibidem*, paras 79-88.

[101] *Autorité de la concurrence,* Decision No. 08-D-25 of 29 October 2008 (*Pierre Fabre Dermo-Cosmetique*), above, Chapter I, para.2.1.

[102] NCA Opinion, paras.323-329.

[103] *Autorité de la concurrence*, Decision No. 12-D-23 of 12 December 2012 on practices implemented by *Bang & Olufsen* in the sector of selective distribution of Hi-fi and home cinema equipment, available at http://www.autoritedelaconcurrence.fr/pdf/avis/12d23.pdf.

In this case, several Hi-fi manufacturers (namely *Bang & Olufsen France, Bose, Focal JM Lab* and *Triangle Industries)* were suspected of preventing their approved distributors from selling their products

The proceedings opened against Bang & Olufsen, suspected of preventing its approved distributors from selling their products via the Internet, had been suspended for two years pending the ruling of the Court of Justice in the *Pierre Fabre* case and came to their end with the present decision. As expected, NCA broadly referred to the ECJ ruling in the *Pierre Fabre* case. The Authority recalled that a clause in a selective distribution contract banning the sale of products online amounts to a restriction of competition by object,[104]and such a restriction is prohibited under Art. 101(1) TFEU, unless it is objectively justified having regard to the properties of the products at issue, or unless it may benefit on an individual exemption under Article 101(3), meeting all its requirements.

NCA also stated that, in any case, such a clause cannot benefit from the block exemption of Regulation 330/2010 on vertical agreements.[105]

In order to assess the actual consequences of the *Pierre Fabre* judgment on Internet distribution, it is necessary to make a distinction between the principle of the prohibition to prohibit Internet sales (Section 1), and the means by which such sales can be regulated and limited (Section 2).

1. It is forbidden to forbid internet sales.

1.1 Confirmation of the principle and assessment of the Judgment

The new Vertical Guidelines clearly state that every distributor must be allowed to use the Internet to sell products.[106]

In *Pierre Fabre* case, the European Court of Justice confirmed the general principle of the "prohibition to prohibit" online sales for the first time in EU case law.

In the case at issue, indeed, the ECJ stated that a ban on internet sales in a selective distribution agreement amounts to a restriction "by object" under the meaning of Article 101 TFEU, unless it is *objectively justified*[107]due to the nature and the properties of the

via the Internet. By its decision No. 06-D-28 of 5 October 2006, the NCA approved and made binding the commitments proposed by the undertakings concerned (with the exception of *Bang & Olufsen*) to amend their selective distribution contracts in order to enable the members of their networks to sell their products online. The proceedings opened against *Bang & Olufsen*, followed their ordinary course.

[104] NCA Decision No. 12-D-23 (*Bang & Olufsen*), para.70.

[105] *Ibidem*, para.100. The Court did not assess the possibility of benefitting of an individual exemption under Art.101(3), as it was not required by *Bang & Olufsen* (para.101).

In line with these principles, NCA held that, by prohibiting *de facto* since 2001 the 48 resellers of its selective distribution network from selling the brand products online, *Bang & Olufsen* has unilaterally limited the commercial freedom of its dealers, who could otherwise have reached more consumers thanks to internet. This ban also limited competition between the distributors of the same brand, thus depriving consumers of lower prices and limiting their choice, in particular for those living a long way from a physical point-of-sale.

Denying the charges and arguing that only mail order sales (not internet sales) were banned, *Bang & Olufsen* provided neither objective reasons nor offsetting benefits which could have exempted the prohibition. On that ground, the Authority imposed a fine of €900.000 *on Bang & Olufsen France* and its Danish parent company *Bang & Olufsen A/S jointly*. In addition, NCA required *Bang & Olufsen France* to amend, within three months, its selective distribution contracts to authorize the dealers to sell the brand products online. In determining the amount of the fine the Authority took account of the gravity of the practice and its duration since 2001 on the one hand, but considered on the other hand that the harm to the economy was very limited as only a small number of consumers could have been affected. This decision was appealed before the Paris Court of Appeal and the case is still pending.

[106] *Guidelines*, para.52.

[107] As discussed above (Chapter I, para. 2.2, *Court of Justice's preliminary* ruling), the expression *"objective justification"* has been used by the ECJ for the first time in the context of art.101(1) in this

product at issue, following an examination of the content and objective of the contractual clause and of the legal and economic context of which it forms a part.[108]

Nevertheless, the position of PFDC, requiring that sales be made in a physical space and that a qualified pharmacist be present, could find support on many arguments developed by the economic analysis of vertical restrictions, making reference especially to the development of efficiencies within the supplier's distribution system and to the need to avoid free riding, if brick and mortar shops with qualified personnel provide pre-sales services that on-line resellers might free-ride. [109]

Pierre Fabre could also be underpinned by some national cases (also cases where PFDC was already involved) stating that a ban on internet sales in a selective distribution system was not anticompetitive if it was justified by the necessity to give personal advice to potential customers.[110]

In the case in question, PFDC argued that requirement of the presence of a qualified pharmacist at the point of sale was objectively justified for two reasons:

- the cosmetics and personal care products concerned, because of their specific nature, required individual advice from a pharmacist to the customer to ensure their correct use;[111]
- the requirement was necessary to protect and maintain the prestigious image of *Pierre Fabre* and the products concerned.[112]

The ECJ rejected both *Pierre Fabre*'s arguments.[113]

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case. It can be interpreted considering the AG Opinion (see from para. 31, *"objective justification"*), and the paragraph 60 of the *Vertical Guidelines*, which provides that "*Hardcore restrictions may exceptionally be objectively necessary for the existence of an agreement of a particular type or nature and fall outside Article 101(1), such as when necessary to align on a public ban on selling dangerous substances to certain customers for reasons of safety or health*."

Therefore, the notion of *"objective justification"* may be considered equivalent to the exceptional circumstances where a restriction may be objectively "*necessary*" (and hence "*justified*"). See SVETLICINII, *Objective justification of "Restriction by Object" in Pierre Fabre* (above), p. 351

[108] ECJ, *Pierre Fabre*, para. 35-39.

[109] See J. VOGEL, *The European Court of Justice rules that absolute bans on Internet sales are prohibited (Pierre Fabre Dermo-Cosmetique)*, 13 october 2011, e-Competitions, No. 39725 and L.VOGEL, *EU Competition Law Applicable to Distribution Agreements* (above, no.2 Chapter II), p. 236.

[110] Belgian Supreme Court*, MAKRO v. BeautéPrestige International,* 10 October 2002 (the Liège Court of Appeal held that the need for personal advice to be given to consumers could constitute an *"objective justification"* to prohibit Internet sales in a selective distribution network, and the Belgian Supreme Court did not overrule this finding); Versailles Court of Appeal, *SA Pierre Fabre Dermo Cosmétiques and others v. M. Breckler A.*, 2 December 1999; Commercial Court, Pontoise, *SA Pierre Fabre Dermo Cosmétiques v. M. Breckler A.,* 15 April 1999. These national precedents are listed in L.VOGEL, *EU Competition Law Applicable to Distribution Agreements* (above no.1), note no.2, p. 236.

[111] ECJ, *Pierre Fabre*, para.44.

[112] ECJ, *Pierre Fabre*, para.45.

[113] As seen in the previous Chapter (para.2.2), the ECJ recalled that, under its well settled case law on selective distribution, those objective justifications are deemed to occur when certain conditions are met: (1) resellers must be chosen on the basis of objective criteria of qualitative nature, laid down uniformly for all potential resellers, and not applied in a discriminatory manner; (2) the characteristics of the contract products necessitate such a distribution network in order to guarantee their quality and proper use, and (3) the criteria set forth do not go beyond what is necessary. (ECJ, *Pierre Fabre*, para.41) In the case at issue, the EU Court did not dispute that the PFDC's distribution system complied with the first requirement, but rejected the compliance with the other conditions, especially referring to the legitimacy of the purpose of such a restriction.

On the first point, the ECJ compared *Pierre Fabre*'s products to non-prescription medicines and contact lenses, and stated that such products did not require individual assistance from a pharmacist to ensure protection of the customer or correct use of the product.[114]According to the Court, *Pierre Fabre*'s requirement, and indirect restriction, was therefore not objectively justified.

In relation to the second argument, the ECJ stated that the preservation of the prestigious image of the products and of *Pierre Fabre* was not an acceptable justification to prohibit online sales.[115]

Therefore, "*a contractual clause requiring sales of cosmetics and personal care products to be made in a physical space where a qualified pharmacist must be present, resulting in a ban on the use of the Internet for those sales, amounts to a "restriction by object" within the meaning of that provision where, following an individual and specific examination of the content and objective of that contractual clause and the legal and economic context of which it forms a part, it is apparent that, having regard to the properties of the products at issue, that clause is not objectively justified*."[116]

As discussed above,[117]the ECJ concluded that the block exemption cannot be applied to an agreement containing such a clause,[118]and that the only possible means of redemption may be the legal exception provided for in Article 101(3) TFEU, if the required conditions are met.[119]Due to the lack of information, the EU Court did not provide any guidance on the matter to the referring Court.[120]

The *Pierre Fabre* judgment has been criticized by many commentators[121]because of the ECJ's treatment of the "*restriction by object*" concept, which allowed qualifying the specified practices as an infringement of Article 101(1) TFEU without any further need to examine their anticompetitive effects.

Although the Court of Justice had stated, as a preliminary point, that, in order to establish a "*restriction by object"*, the content of the clause, its objectives, and the economic and legal context of which it forms a part must be taken into consideration, nevertheless in its judgment the ECJ adopted a legal, formal approach based on a *per se* prohibition. The Court, indeed, did not consider the effects of the practices and the state of competition on the market, focusing only on the characterization of the restriction and establishing the disproportionate character of a clause providing for a *de facto* ban on Internet sales in general.

In this case, *Pierre Fabre* held only the 20 per cent share of the French market for cosmetics and personal care to be sold with the advice of a pharmacist. In spite of such a

[114] ECJ, *Pierre Fabre*, para.44. The Court made reference to other two cases, *Deutscher Apothekerverband* (above), paragraphs 106, 107 and 112, and Case C-108/09 *Ker-Optika* (2010). ECR I-0000, paragraph 76

[115] ECJ, *Pierre Fabre*, para.46. This issue will be examined in greater detail in the next paragraph of this paper.

[116] ECJ, *Pierre Fabre*, para. 47.

[117] Chapter I, para. 2.2, *Court of Justice's preliminary ruling.*

[118] ECJ, *Pierre Fabre*, para. 59.

[119] *Ibidem*.

[120] ECJ, *Pierre Fabre*, para. 50.

[121] See V.C. ROMANO, *"ECJ Ruling on the Prohibition of On-line Sales in Selective Distribution Networks"*, *Journal of European Competition Law & Practice",* n.4, p. 345-347 (hereinafter ROMANO, *ECJ Ruling on the Prohibition of On-line Sales in Selective Distribution Networks),* P.346; L.VOGEL, *EU Competition Law Applicable to Distribution Agreements* (above no.2), p.237; J. VOGEL, *The European Court of Justice rules that absolute bans on Internet sales are prohibited (Pierre Fabre Dermo-Cosmetique)*, 13 october 2011, e-Competitions, No. 39725.

narrow definition of the market, PFDC position was far from being dominant,[122]and its major competitors adopted a selective distribution system, although most of them allowed online sales. Such a setting suggested that inter-brand competition was active in the market and that a restriction on sales via the Internet imposed by one of the players was not likely to affect inter-brand competition.[123]*Pierre Fabre*, moreover, had a very high level of intra-brand competition, by having 23,000 outlets in France.[124]

Contrary to the suggestion of the General Advocate Mazak, for whom "*the anticompetitive object of an agreement may not therefore be established solely using an abstract formula*",[125]the ECJ did not analyze the high level of inter-channel, intra and inter-brand competition existing on this market.

1.2 Interpretation of the Judgment as a quasi-absolute prohibition on banning Internet sales

Despite the confirmation of the general principle, the *Pierre Fabre* judgment seems to open two doors to justify possible bans on Internet sales: the *"objective justification"* related to the nature of the products in question and, as a last resort, an individual exemption.[126]However, given the harshness of the conditions set down by the judgment, the possibility of being "objective justified" or of benefitting from an individual exemption is limited to exceptional circumstances, and leaves little hope for any possible exceptions to the prohibition on banning Internet sales.

a) Objective justification for certain products

The ECJ stated that, in order to assess whether a contractual clause prohibiting online distribution is objectively justified,[127]it is necessary to "*have regard to the properties of the products at issue*."[128]The Court recalled that, under its case law on selective distribution, one of the conditions to be met in order to provide an objective justification to such a limitation is "*that the characteristics of the product in question necessitate such a network in order to preserve its quality and ensure its proper use*".[129]Moreover, the Guidelines specify that "*"hardcore restrictions" may be objectively necessary in exceptional cases for an agreement of a particular type or nature*".[130]

Thus, a first justification could be found in the particular nature of certain products, which would objectively justify their resale only in brick and mortar outlets.

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[122] See COMMISSION, *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings* (2009) O.J. C 045, para.14: "*The Commission considers that low market shares are generally a good proxy for the absence of substantial market power. The Commission's experience suggests that dominance is not likely if the undertaking's market share is below 40 % in the relevant market. However, there may be specific cases below that threshold where competitors are not in a position to constrain effectively the conduct of a dominant undertaking*".

[123] LEAR, *Vertical Restraints in Electronic Commerce: an economic perspective* (above no.2), p.5.

[124] L.VOGEL, *EU Competition Law Applicable to Distribution Agreements* (above no.2), p.238 and *Idem*, *Efficiency vs Regulation* (above no.4), p. 282.

[125] AG Opinion, point 26.

[126] For such a view of the judgment at issue, see L.VOGEL, *EU Competition Law Applicable to Distribution Agreements* (above no.1), p. 238.

[127] For the notion of *"objective justification"*, see above, footnote no.4 in the present Chapter.

[128] ECJ, *Pierre Fabre*, para. 47.

[129] ECJ, *Pierre Fabre*, para. 41.

[130] *Guidelines*, para. 60.

According to the Commission,[131]the concept of *"objective justification"* should be interpreted strictly, referring only to totally exceptional justifications based on overriding mandatory national or European law provisions aimed at protecting public order for reasons of consumer safety and health, or any other consideration related to the protection of public order.[132]

In order to provide an *"objective justification"* for the prohibition of the online sales within its selective distribution system, PFDC argued that this concept should extend beyond public health and safety concerns.[133]in this regard, PFDC referred to the case Copad, where the ECJ held that "*the proprietor of a trade mark can invoke the rights conferred by that trade mark against a licensee who contravenes a provision in a licence agreement prohibiting, on grounds of the trade mark's prestige, sales to discount stores (...) provided it has been established that that contravention (...) damages the allure and prestigious image which bestows on them an aura of luxury*[134]*"*

The Advocate General Mazak pointed out a more liberal view, admitting that, in certain exceptional circumstances, private voluntary measures limiting the sale of goods or services via the Internet could be objectively justified, because of the nature of those goods or services or of the customers to whom they are sold.[135]

In the case at issue, however, AG shared the views of the French NCA[136]and of the Commission[137]in refusing PDFC the objective justification on the ground that "*the legitimate objective sought must be of a public law nature and therefore aimed at protecting a public good and extend beyond the protection of the image of the products concerned or the manner in which an undertaking wishes to market its products*".[138]Thus,

[131] *Amicus curiae* brief of the Commission in front of the Paris Court of Appeal, *Observations de la Commission des Communautes Europeennes en application de l'Article 15, paragraphe 3 du Reglement n° 1/2003 dans l'affaire Pierre Fabre,* 11 June 2009 (above, Chapter I para.2.1), "*Commission observations*".

[132] *Commission observations*, paras.14-16. See also *Guidelines*, para.60: "*For example, a hardcore restriction may be objectively necessary to ensure that a public ban on selling dangerous substances to certain customers for reasons of safety or health is respected*." It is important to underline, however, that the Guidelines provide an example, not the full interpretation of the concept of *"objective justification"*. Also the previous Guidelines, expressly mentioning this notion, provided the same example ("*A prohibition imposed on all distributors to sell to certain end users is not classified as a hardcore restriction if there is an objective justification related to the product, such as a general ban on selling dangerous substances to certain customers for reasons of safety or health*" para.49) and stated that an outright ban on Internet "*is only possible if there is an objective justification*"(para.51). In its *amicus curiae* brief, the Commission made reference to these provisions of 2000 Guidelines (paras.18 and 51 of *Communication from the Commission - Notice – Guidelines on the application of Article 81(3) of the Treaty*, OJ C 101, 27.4.2004). On this point, see also SAINT-ESTEBEN, *On-line reselling and selective distribution networks* (above), p. 247, who affirms that this is perplexing, since the text seems to target any *"objective justification"* generally.

[133] ECJ, *Pierre Fabre*, para 44.

[134] ECJ of 23 April 2009, C-59/08 *Copad SA _ Christian Dior couture SA and Others*, para. 37. This is in line with the Strawberrynet case (*Strawberrynet*, Paris Court of First Instance, January 11, 2006, Ref. No 04-09989), where the Paris Court of First Instance described selective distribution (for perfumes) as legitimate for manufacturers willing to build or maintain an image of luxury and prestige for their trademarks and products. See A.L. SHAPIRO, "*Different approaches to Internet commerce and antitrust in the EU and the US"*, *Mlex Magazine,* July-September 2012, available at http://awards.concurrences.com/business-articles-awards/article/different-approaches-to-internet.

[135] AG Opinion, points 33-35.

[136] French NCA Decision (above), para.66.

[137] *Commission observations*, paras.14-16.

[138] AG Opinion, point 35.

objective justifications such as the protection of the image of the products or the defense against the threat of counterfeiting and the risk of free riding, as put forward by *Pierre Fabre*, are not sufficient.

At the same time, AG alleged that in case of luxury goods "*this ratio could be extended in certain circumstances to non-branded goods and indeed services where the manner in which goods and services are presented will affect consumers' perception of their quality*".[139]*AG Mazak* further noted that the maintenance of a specialist trade providing specific services related to the quality of the goods may justify a reduction of price competition in favour of competition based on factors other than price.[140]Nevertheless, these qualitative criteria must not go beyond what is objectively necessary in order to distribute the products in an appropriate manner taking into account their qualities, aura or image.[141]

The fact that PFDC, instead of establishing reasonable and nondiscriminatory conditions for online sales, resorted to an outright ban on Internet sales prompted the Advocate General to conclude that the specified practices could be viewed as a restriction by object.[142]

According to this reasoning, there can be only few products for which an objective justification could be admitted. It is possible to state that the European authorities have transposed the traditional freedom of movement rule of reason to competition law.[143]The words used by AG and by the ECJ ("necessity", "proportionality", *"objective justification"*) are indicative of this conception.[144]The symmetry of the reasoning is clear when the Court states that "*in the light of the freedom of movement,* (the Court) *has not accepted arguments relating to the need to provide individual advice to the customer and to ensure his protection against the incorrect use of products, in the context of non-prescription medicines and contact lenses, to justify a ban on Internet sales*."[145]

This interpretation does not take into account the situation of the market and focuses on the public policy reasons, which could constitute the basis of a restriction of competition under the rules of free movement, but has no basis in competition law. Under such a reasoning, the argument of the maintaining of the prestigious image of the product, usually considered decisive under the rules of selective distribution, has no chance of being accepted as a legitimate aim for restricting competition.[146]

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[139] *Ibid*, endnote 44.
[140] *Ibid*, point 46.
[141] *Ibid*, point 51.
[142] See A.C. MARTIN, *Internet distribution: The ECJ Advocate General issues his opinion on the preliminary question referred by the Paris Court of Appeals concerning Internet retail distribution (Pierre Fabre)*, April 2011, e-Competitions, No. 36316 and SVETLICINII, *Objective justification of "Restriction by Object" in Pierre Fabre* (above), p. 349-350.
[143] See A. THEMELIS, "*After Pierre Fabre: the future of online distribution under Competition policy"*, *Journal of Law and Information Technology*, September 2012, p. 346-369 (hereinafter "THEMELIS, *After Pierre Fabre"*), p. 350; L.VOGEL, *EU Competition Law Applicable to Distribution Agreements* (above, no.1 Chapter II), p.238.
[144] L.VOGEL, *EU Competition Law Applicable to Distribution Agreements*, p. 238.
[145] ECJ, *Pierre Fabre*, para.44.
[146] See L.VOGEL, *EU Competition Law Applicable to Distribution Agreements* (above no.1), p.238; SVETLICINII, *Objective justification of "Restriction by Object" in Pierre Fabre* (above), p.350.

The Court of Justice, indeed, stated that "*the aim of maintaining a prestigious image is not a legitimate aim for restricting competition and cannot therefore justify a finding that a contractual clause pursuing such an aim does not fall within Article 101(1) TFEU*".[147]

This raised practitioners' concerns that, following *Pierre Fabre*, manufacturers of luxury brands might may face difficulties in maintaining the image of their products through the use of selective distribution systems; namely, it might make it difficult to control the distribution of their products via the Internet.[148]

b) Individual exemption under Art. 101 (3)

The ECJ stated that the Vertical Block Exemption Regulation does not apply to a selective distribution contract containing a clause prohibiting *de facto* the Internet as a method of sale the contractual products.[149]

The Court clearly excluded the application of the block exemption, but not the possibility of benefitting of the individual exemption under Art.101(3) TFEU. The ECJ recalled that to benefit from an individual exemption, all conditions set out in Article 101(3) must be met.[150]In this case the Court did not assess those requirements, as it considered it did not have sufficient information.[151]The question was referred back to the national court.

Given the harshness of the conditions set down by the judgment, however, the possibility of benefitting from the individual exemption was limited to exceptional circumstances, as it was confirmed in the Ruling of the Paris Court of Appeal.

In its judgment of 31 January 2013,[152]indeed, following the judgment of the European Court, the Paris Court of Appeal strictly applied the ECJ's test to characterize the anticompetitive object of the clause prohibiting online sales, and rejected *Pierre Fabre*'s claim as regards to the individual exception of Article 101(3) TFEU.

As noted above,[153]the *Cour d'Appel* considered that two of the criteria set in Article 101(3) were not met:

1. indispensable nature of the restriction: the Court of Appeal stated that the applicant shall establish that a ban on Internet sales would be necessary so that the consumer could receive the best possible personalized advice and that, in absence of such a ban, the quality of the advice that the client could get would be substantially reduced. The Court determined that PFDC's selective distribution agreement imposed restrictions which, given the nature of the product, were not indispensable to guarantee consumers a personalized quality service advice; [154]

[147] ECJ, *Pierre Fabre*, para.46.

[148] See SVETLICINII, *Objective justification of "Restriction by Object" in Pierre Fabre* (above), p.350.

[149] ECJ, *Pierre Fabre*, para.59. See above, Chapter I, para.2.2.

[150] ECJ, *Pierre Fabre,* paras.49 and 59. As noted above (Chapter I, para.2.3*, Cour d'appel ruling*), these conditions are:

the agreement constitutes an improvement in the production or distribution of goods or in technical or economic progress (efficiency gains);

consumers receive a fair share of the resulting benefit;

only restrictions indispensible to the achievement of these objectives are imposed; and

the agreement does not eliminate competition in the product markets concerned.

[151] ECJ, *Pierre Fabre,* para.50.

[152] *Cour d'Appel de Paris* (Pole 5), Arret du 31 Janvier 2013 dans l'affaire *Pierre Fabre Dermo-Cosmetique/Autorite de la Concurrence* (above).

[153] See Chapter I, para.2.3*, Cour d'appel ruling.*

[154] *Cour d'Appel de Paris*, Arret du 31 Janvier 2013 dans l'affaire *Pierre Fabre* (above), p. 18.

2. efficiency gains: the Court of Appeal considered that the requirement as to the contribution to improve production or distribution, or promoting technical or economic progress was neither met. According to the Court, PFDC failed to show that online sales increased the risk of counterfeiting and that its products were less exposed to this risk compared to competing products which are sold via the Internet.[155]

Ultimately, it is hard that a restriction which is not objectively justified could benefit from an individual exemption, because there does not seem to be scope for the application of any additional exemption.[156]In the current state of the law and with reference to the *Pierre Fabre* rulings, it seems impossible or at least highly risky to justify a prohibition on sales on the Internet by a supplier to its distributors, with the benefit of an individual exemption.[157]

1.3 Extension of the ban to mail order sales

The issue of the alignment of clauses prohibiting mail order selling with those forbidding Internet sales was addressed in the context of the judgment of the French Court of Cassation on 20 March 2012, in another case involving *Pierre Fabre*.[158]In this case, a distributor's authorization was retired by PFDC because the seller had distributed a mail order catalogue of products of the brand. The distributor sued *Pierre Fabre* arguing that the clause requiring sales to be made from a physical outlet was unlawful.[159]

Mail order sales are a method of distance selling which existed before Internet selling. The lawfulness of selective distribution agreements forbidding mail order sales depended mainly on the nature of the product concerned (e.g. luxury goods, need for pharmaceutical advice). The national and European authorities often considered that these agreements could have as their effect, but not as their object, the restriction of competition.[160]

In the judgment rendered on 20 March 2012, the French Court of Cassation, influenced by the European case law, adopted a much harsher position for clauses prohibiting mail order sales by partially transposing to mail order sales the solution applicable to Internet sales; moreover, the Court of Cassation criticized the Court of Appeal for not having examined whether the prohibition of mail-order selling led to a restriction of active or passive sales. Nevertheless, the Toulouse Court of Appeal had held that the prohibition of the sale of a product online within an authorised selective network was not equivalent to

The *Cour d'Appel* ruled that, by having the possibility of acquiring the products on-line, the client would *i*) have all the necessary information available, including detailed instructions of use, *ii*) be able to cross-check with other information contained in similar products, *iii*) be able to obtain advice via e.g. hotline service.

[155] *Cour d'Appel de Paris*, Arret du 31 Janvier 2013 dans l'affaire *Pierre Fabre* (above), p. 20.
Moreover, the Court stated that PFDC did not show either that consumers were fully informed of the internet sales ban. Accordingly, it could not be ruled out that consumers could distinguish between genuine products sold in outlet and the products sold online and allegedly counterfeit.

[156] See L.VOGEL, *EU Competition Law Applicable to Distribution Agreements* (above no.1), p.239.

[157] *Ibidem*.

[158] *Cour de cassation - Chambre commerciale, financière et économique- Arrêt n° 319 du 20 mars 2012 (10-16.329) - Atrium santé v. Pierre Fabre Dermo Cosmetique.* (hereinafter "Court of Cassation, *Pierre Fabre"*), available at
http://ec.europa.eu/competition/national_courts/cases/134071/134071_4_2.pdf.

[159] On this issue, see L. VOGEL, *Efficiency vs Regulation,* (above no.3, Chapter II), p.283.

[160] Paris Court of Appeal, 15 September 1993, LawLex200203066JBJ; NCA decision No 93-D-49 of 16 November 1993, LawLex200203146JBJ; NCA Decision No 96-D-76 of 26 November 1996, LawLex200202663JBJ. See L. VOGEL, *Efficiency vs Regulation,* (above no.3, Chapter II), p.282.

the prohibition of traditional mail order trading, by taking up the analysis of the French Competition Authority of 29 October 2008 in the *Pierre Fabre* decision.[161]

This unjustified assimilation of mail order sales with online sales, however, appear to have been called into question in the recent *Pierre Fabre* judgment rendered by the Paris Court of Appeal on 31 January 2013.[162]Indeed, according to the *Cour d'Appel*, the fact that mail order sales and Internet sales constitute distance selling does not lead to the conclusion, without individual examination, that the provisions governing those sales in a given selective distribution contract have the same or similar object or can only be analyzed in terms of their effects.[163]

2. Selective Distribution and Online sales: after *Pierre Fabre*, the possibility of restricting the methods of online selling remains.

The *Pierre Fabre* judgment seems to have fixed for a moment the substantive law. But, even if under the current state of law it is forbidden to ban Internet sales, the possibility to organize and regulate this method of selling remains.

In this section, only the restrictions of online sales in the context of selective distribution will be considered, as in the case at hand.

Under EU competition law, limitations inherent in a selective distributions system,[164]such as the reduction of intra-brand price competition from price discounters (including online sellers) and the risk of foreclosing more efficient distributors, are acceptable only on the condition that there are other legitimate requirements whose aim is in fact an overall improvement of competition in relation to factors other than price (e.g. the maintenance of a specialist trade capable of providing specific services to high-quality and high-technology products).[165]Otherwise, as stated in *Pierre Fabre*, the selective distribution system would be a restriction on competition by object with the sole purpose of reducing intra-brand price competition.[166]

The practice has developed several organization methods for online selling in order for this distribution channel to contribute in an efficient and balanced way to the sales of distribution networks. The organization methods and conditions of online selling can be subdivided into two categories: those that are generally acknowledged and accepted by European or National Courts and/or competition authorities and those that are contested and disputed.[167]

[161] *Autorité de la concurrence,* Decision No. 08-D-25 of 29 October 2008 (Pierre Fabre Dermo-Cosmetique), examined above, Chapter I, para.2.2.

[162] *Cour d'Appel de Paris* (Pole 5), Arret du 31 Janvier 2013 dans l'affaire *Pierre Fabre Dermo-Cosmetique/Autorite de la Concurrence* (above).

[163] *Ibidem*, p.7.

[164] The restriction on competition resulting from selective distribution may be more pronounced when a majority of the main suppliers adopt the same type of distribution system (cumulative effect). See *Vertical Guidelines*, paras. 178-179.

[165] See ACCARDO, *Vertical Antitrust Enforcement* (above), p. 285.

[166] ECJ, *Pierre Fabre,* paras. 39,46.

[167] See L.VOGEL, *EU Competition Law Applicable to Distribution Agreements* (above no.1),p.239.

2.1 The acknowledged methods: quality standards requirements

Quality Standards Requirements

The imposition of quality standards represents the main requirement of selective distribution networks for promoting the brand image of the products.[168]

Authorised dealers within a selective distribution system should be free to sell, both actively and passively, to all end users on the internet.[169]

The Vertical Guidelines provide some guidance about restrictions on authorised dealers, such as quality standards requirements on websites, conditions to provide specific services to online customers, and physical shop requirements.

The Guidelines essentially acknowledge that there are inherent qualitative differences in retailer characteristics between e-commerce and traditional channels. While similar qualitative criteria for selective distribution across both forms of distribution may not be feasible for certain requirements, the criteria for online sales must nevertheless be "overall equivalent" to the standards imposed on bricksand-mortar shops, meaning that the criteria must pursue the same objectives and achieve comparable results. If the requirements fail to be "*overall equivalent*" [170]then they would likely be considered hardcore restrictions.[171] Moreover, such standards must be proportionate to the aim pursued.[172]

[168] As recalled by the ECJ in Pierre Fabre (para.41- see Chapter I, section 2.2 of the present paper-), qualitative requirements that authorised dealers must meet in order to be admitted to the selective distribution network fall, in principle, outside Article 101(1) TFEU for lack of anticompetitive effects (*Guidelines,* para. 175), provided that the following conditions are satisfied:

- The nature of the product in question must necessitate a selective distribution system, in the sense that such a system must constitute a legitimate requirement, with respect to the nature of the product concerned, to preserve its quality and ensure its proper use (eg ECJ, December 11th 1980, L'OREAL v. PVBA DE NIEUWE, C- 31/80, par. 15-16; *Paris Court of Appeal*, June 8th 2005, LCJ DIFFUSION/LA ROCHE POSAY)
- Resellers must be chosen on the basis of objective criteria of a qualitative nature that are set forth uniformly for all and made available to all potential resellers and are not applied in a discriminatory manner (ECJ, October 25th 1977, METRO SB-GROSSMAERKTE GMBH v. COMMISSION, C-26/76, par. 20-21; *Croatian Competition Agency*, December 30th 2008, CCA v. VIPNET D.O.O. ZAGREB)
- the criteria set forth must not go beyond what is necessary in accordance with the principle of proportionality (ECJ, L'OREAL –above- case 31/80, paras.15,16; ECJ, METRO -above- paras.20,21; ECJ, October 25th 1983, AEG-TELEFUNKEN A.G. v. COMMISSION OF THE EUROPEAN COMMUNITIES, case 107/82, para. 35, Case T-19/91 *VICHY v COMMISSION* [1992] ECR II-415, para.65).

The question as to whether the above conditions are fulfilled requires an objective assessment which considers the interests of consumers; the selective distribution system must ultimately enhance competition and, consequently, counterbalance its inherent restrictions on competition, particularly with respect to price.

For an overview of EU and National case law on this issue, see S. KINSELLA, R. CONNOLLY, "*Selective Distribution: an overview of EU and National case law"*, e-Competitions n. 39750, November 2011, available at http://awa2012.concurrences.com/academic/article/selective-distribution-an-overview.

[169] *Guidelines*, para. 56.

[170] *Ibidem.* Guidelines precise that "*This does not mean that the criteria imposed for online sales must be identical to those imposed for off-line sales, but rather that they should pursue the same objectives and achieve comparable results and that the difference between the criteria must be justified by the different nature of these two distribution modes*." (para.56).

[171] *Guidelines*, para.53.

[172] *French Competition Authority* Decision No 07-D-07 relative to practices implemented on the cosmetics and personal care distributor sector (hereinafter "*Cosmetics")*, para.127. NCA applies a triple test, a supplier being able to apply different conditions under three cumulative requirements: i) the restrictions to

I) Restrictions Relating the Quality of the Website.

While concerns for brand image do not justify a ban on the use of the internet, as confirmed in *Pierre Fabre* case, the manufacturer may legitimately require its authorised distributors to comply with requirements relating to the quality of the website. For instance, the following requirements may be considered acceptable: creating a dedicated webpage within an online store such that products are displayed on the distributors' websites in a way that avoids any confusion with competitors' products;[173]requiring a former approval of information, banners, logos, colours and formatting related to the products;[174]respecting the graphical requirements of the supplier, in accordance with the products' brand image;[175]and including a link to the supplier's website[176]or to other distributors' websites.[177]

Conversely, the following requirements may be deemed excessive: creating a website exclusively for the sale of products with professional (eg pharmaceutical) counselling; providing a payment point reserved for the products at issue; and stipulating excessive specifications for the presentation of the product, like descriptions and compulsory pixel resolution for pictures.[178]

One can reasonably argue that such requirements raise the costs for entering the online channel and ultimately discourage online selling.[179]

Similarly, the mandatory translation of a website into foreign languages may be considered an excessive requirement aimed at dissuading the use of a website.[180]The supplier, however, is entitled to require the use of the language of the countries where the reseller accepts to delivery.[181]

Internet sales must be comparable to those imposed on brick and mortar outlets; ii) these restrictions must not discourage the authorised distributors from using the Internet; these restrictions must be proportionate to the aim of the supplier.

[173] See French Competition Authority Decision No 06-D-24 concerning *Festina France.*

[174] *Ibid*.

[175] *Nanterre Commercial Court*, 4 October 2000; *French Competition Authority* Decision No 07-D-07 concerning *Cosmetics.*

[176] French Competititon Authority Decision No 06-D-28 concerning *Hi-Fi.*

[177] *Guidelines*, para. 52(a).

[178] See French Competition Authority Decision No 07-D-07 concerning *Cosmetics*.

[179] See ACCARDO, *Vertical Antitrust Enforcement* (above), p. 292.

[180] See French Competition Authority *Decision* No 07-D-07 concerning *Cosmetics,* paras. 121–123. During the consultation process that lead to the adoption of the new rules by the Commission, it was discussed whether members of a selective distribution system could be prevented from setting up websites in a language different from that spoken in their authorised place of establishment, based on the fact that the manufacturer may legitimately restrict the place of establishment of its authorised distributors, without losing the benefit of the VBER.

The question subtended essentially focused on whether the term "place of establishment" could be taken, through a broad interpretation, to encompass the place from which internet sales services are provided. The "answer" to that question is indirectly evidenced in the actual text of the *Vertical Guidelines*, para.57, stating that "*the use by a distributor of its own website cannot be considered to be the same thing as the opening of a new outlet in a different location*". See ACCARDO, *Vertical Antitrust Enforcement* (above), p. 292.

[181] French Competition Authority *Decision* No 07-D-07 concerning *Cosmetics*, para.122.

II) Requirements to Provide Specific Services to Online Customers.

The manufacturer may also seek to impose restrictions on the services to be provided to online customers. As noted above, it is possible to impose different conditions for on line sale and physical sale as long as they are equivalent.[182]

For instance, in order to ensure timely delivery of contract products, a supplier may require that products be delivered immediately for offline sales, but an identical requirement clearly cannot be imposed for online sales. The supplier may, however, specify certain practicable delivery times for such sales.[183]

Similarly, specific requirements may have to be formulated for an online after-sales help desk, like that the costs for presale assistance, for the application of secure payment systems and for customer returns are covered.[184]For example, such a help desk could answer any questions asked online by consumers within a short period of time (but not in real time or outside the opening hours of bricks-and-mortar shops), eventually in the languages of all the countries where the distributor delivers.[185]Conversely, requirements like translating the website into foreign languages or making sales only to customers who have webcams, so the distributor can interact with the customer seeking advice, may be considered excessive.[186]

III) Bricks-and-Mortar Shop.

The most powerful restriction, among all the quality standards requirements, is that distributors may be required to have one or more bricks-and mortar shops or showrooms as a condition for becoming a member of the manufacturer's network of authorised distributors, and, thus, before they can actually sell the manufacturer's product online. The European Commission, indeed, accepted in its Guidelines that a supplier could require that its selective distributors wishing to sell online have a physical outlet.[187]

Therefore, pure-online retailers can, in principle, be kept outside the distribution network of authorised dealers, and sales to such resellers can also be prohibited.[188]

The possibility of requiring a physical point of sale in the context of a selective distribution network shows the concern for balance the complementary nature of "physical" and "online" sales, the so-called "*click&mortar*"[189]form of distribution.

[182] *Guidelines*, para.56.
[183] See ACCARDO, *Vertical Antitrust Enforcement* (above), p. 295.
[184] *Guidelines*, para.56. See also European Commission, XXVth Competition Report 1995: *Sony Pan-European Dealer Agreement 135* (1995), where the Commission required Sony to oblige authorised mail-order resellers to offer enhanced services (home delivery and the grant of a non-binding trial period for mail-order purchasers) to consumers to justify their inclusion in the selective distribution system. The Commission Report is available at http://ec.europa.eu/competition/publications/annual_report/1995/en.pdf.
[185] See French Competition Authority Decision No 07-D-07 concerning *Cosmetics.*
[186] See *ibidem*. On this point, however, see also the French Competition Authority Decision No 06-D-28 concerning *Hi-Fi,* admitting that for the most sophisticated products, the customer must be given the option to test the product in a physical outlet before purchasing it via the internet.
[187] *Guidelines*, para.54. See also Commission decision IP/01/713 *Yves Saint Laurent Parfums* of 17 May 2001 and IP/02/916 *B&W Loundspeakers*, 24 June 2002.
[188] See, eg *Bijourama v Festina France SAS,* Paris Court of Appeal 16 October 2007, 2006 RG 17900, 2007; *PMC Distribution v Pacific Creation*, Paris Court of Appeal 18 April 2008, 2007 RG 04360, admitting that a manufacturer could limit the ability of bricks-and-mortar stores, which had been opened for a maximum of one year, to sell online.
[189] See NCA Opinion on the e-commerce (above no.6), para.14.

Justification for requiring a physical point of sale derives above all from the risk of "parasitism" that pure on-line players could practice on the "physical" network.[190]

The exclusion of pure online players, however, must ultimately be reconciled with the established EU case law, whereby qualitative criteria cannot have the object or effect of excluding *a priori* modern distribution systems. In *AEG-Telefunken*, the Court of Justice held that "*Nor is the attitude (...) mentioned in the (Commission) decision acceptable either in so far as (...) it presupposes that the new forms of distribution are not, by their very nature and type of organisation, capable of satisfying the specialist trade conditions (...) A manufacturer who has introduced a selective distribution system cannot therefore absolve himself, on the basis of an a priori evaluation of the characteristics of the various forms of distribution, from the duty of checking in each case whether a candidate for admission satisfies the specialist trade conditions."* [191]

As a result, manufacturers are required to carry out a case-by-case assessment of the restrictions they intend to introduce in each circumstance.[192]

Where appreciable anticompetitive effects occur, such as preventing access to the market by new distributors capable of adequately selling the products in question,[193]the Commission may withdraw the benefit of the VBER or the conditions of Article 101(3) TFEU may not be fulfilled. Particularly when used throughout a market, the physical point of sale requirement can effectively exclude consumers from the benefits of products offered by online-only distributors.[194]

In general, changes to the selection criteria are possible under the VBER in order to include having a bricks-and-mortar shop, even when such a requirement was not originally in place, except where such change has the object of either directly or indirectly limiting online sales by the distributors[195]or punishing a distributor for selling successfully over the internet, particularly in territories where the supplier/other distributors charge higher prices.

In practice, nevertheless, the access to a network requiring a brick and mortar shop according to the Guidelines can be passed by an undertaking having a pure-online business model and willing to enter however the network.[196]The easiest way is to establish

[190] See SAINT-ESTEBEN, *On-line reselling and selective distribution networks (*above), p.249.

[191] ECJ, Case 107/82 *AEG-Telefunken AG v Commission* (1983) ECR 03151, paras.74–75.
In its decision, the Commission actually found that the deciding factor for AEG was not whether the sales outlets had the necessary technical expertise or suitable premises for selling AEG products, but whether they might endanger the high-price policy pursued by AEG.

[192] ECJ, C-31/85 *ETA Fabriques d'Ebaucher SA v DK Investment SA* (1985) ECR 3933, para.16.

[193] It is true that the VBER exempts selective distribution regardless of the nature of the product concerned and the nature of the selection criteria. However, where the characteristics of the product do not require selective distribution or do not require the applied criteria, particularly the requirement for distributors to have one or more bricks-and-mortar shops or showrooms or to provide specific services, such a distribution system does not generally bring about sufficient efficiency enhancing effects to counterbalance a significant reduction in intra-brand competition.
(*Guidelines*, para. 176).

[194] When parallel networks of selective distribution exceed a certain market threshold (above 50%), the Commission may consider withdrawing application of the VBER, specifically when the selective distribution systems at issue prevent access to the market by new distributors capable of adequately selling the products in question, especially price discounters or online-only distributors offering lower prices to consumers, which limits distribution to the advantage of certain existing channels and to the detriment of final consumers (*Guidelines,* paras.176, 178–179).

[195] *Guidelines,* para.54.

[196] See L.VOGEL, *EU Competition Law Applicable to Distribution Agreements* (above no.1), p.240.

a physical shop in order to enter the network while at the same time making e.g. 99 per cent of sales on-line.

A first reaction of the supplier could be to require its distributors to have several bricks and mortar shops, but this does not necessarily match with the structure of the network.[197]

A second possibility may be to demand a minimum absolute turnover in brick and mortar shops. To ensure the proper functioning of the physical points of sales and prevent the emergence of "fictitious" shops, indeed, the Guidelines provide that the supplier can require "*without limiting the online sales of the distributor, that the buyer sells at least a certain absolute amount (in value or volume) of the products off-line to ensure an efficient operation of its brick and mortar shop*."[198]

The Commission considers that the amount can be the same for all the distributors or can be determined individually on the basis of objective criteria, such as the buyer's size in the network or its geographic location.[199]

It is important to underline that the French Competition Authority has, until now, accepted these practices. However, in its recent opinion on the competitive functioning of e-commerce,[200]NCA has been much more reticent and has pointed to the possible restrictive effects of having a physical retail outlet. It recommends that the analysis take particular account of the actual need for the various services carried out by physical retail outlets, of the risk of free-riding and of the services provided by online sites.[201]It also demands that the condition of having a physical retail outlet be proportional in comparison with the objective pursued in particular where there are requirements in terms of the number of physical stores.[202]

These reservations limiting the possibility to require that selective distributors have a physical sales outlet can be seen as symptomatic of the significant bias in favour of Internet sales raised after the *Pierre Fabre* judgment.[203]

These restrictions may face two major objections.[204]First, direct competition between dealers assuming the costs of a physical store and pure players free of those expenses cause a free-riding phenomenon likely to weaken physical stores, and, in the long term, to lead also to their disappearance. Thus, from the point of view of competition, the requirement of having a physical store is justified by the need to prevent free-riding. Second, insofar as the requirement of a physical store is regarded as a selection criterion, regardless of whether it is qualitative or quantitative, it should not, when below the block exemption thresholds, be subject to any additional conditions.

2.2 The contested methods: quantitative measures and use of third party platforms

As noted, certain qualitative restrictions on online sales are generally accepted by Competition Authorities and Courts. Nevertheless, other practices aimed to limit the sales via the Internet have raised concerns and are still disputed. The main contested restrictions

[197] *Ibidem*.
[198] *Guidelines,* para.52.
[199] *Ibidem*.
[200] NCA Opinion No. 12-A-20 of 18 September 2012 concerning how competition operates in the e-commerce sector (above, Chapter II, no.5).
[201]*Ibidem*, paras. 337-345.
[202] *Ibidem*, paras.346-347.
[203] For this view, see L. VOGEL, *Efficiency vs Regulation* (above, Chapter II, no.3), p. 283.
[204] *Ibidem*.

concern quantitative measures, such as volume caps and dual pricing, and the use of third-party platforms.

I) Quantitative Measures.

While quality requirements generally address a manufacturer's concerns about brand image, the manufacturer may impose certain restrictions to ensure the efficiency and consistency of the distribution channels within its selective distribution network. Generally, this can be done by regulating volume sales or certain cost variables.[205]

In particular, requiring a distributor to limit the proportion of overall sales made over the Internet ("*volume caps*"), or requiring a distributor to pay a higher price for products to be resold online than for products intended to be resold offline ("*dual pricing*"[206])are both considered hardcore restrictions having the sole purpose of limiting the development of the online channel.[207]

Volume caps are by definition dissuasive measures; however, rather than limiting their online sales,[208]the manufacturer could instead ensure the efficient operation of the offline channel by imposing a less restrictive solution, such as requiring its distributors to sell offline at least an absolute amount (in value or volume)[209]

Interestingly, before the adoption of the current EU rules, the German Federal Supreme Court adopted a relatively lenient approach.[210]The case concerned the right by a perfume manufacturer to terminate the distribution contract when total online sales of a distributor reached a certain percentage of all sales or when the total sales traded through e-commerce exceeded the sales traded by the brick and mortar business. The Federal Supreme Court held that this clause was admissible, because it is in the manufacturer's interest to protect its brand products against distribution channels that might be in conflict with the aura of

[205] See ACCARDO, *Vertical Antitrust Enforcement* (above), p. 296.

[206]Actually, "*dual pricing*" means selling the same or identical product at different prices in different markets. The Commission prohibits to require *different* prices for the same products sold online and offline. Thus, this ban includes also the requirement of higher costs for the same products sold in brick and mortar outlets. However, such a prohibition do not take into account that a price differentiation may be economically justified by the fact that brick and mortar retailing entails higher costs than on-line reselling and therefore the need for a greater margin to cover these costs.

In the present section, dedicated to the possible *restrictions* of the Internet distribution, the issue of dual pricing will be addressed only considering the hypothesis of requiring higher prices for online sales. For a comment on the prohibition of requiring different and higher prices for products sold in physical shops, in case of direct and indirect dual pricing and a critical approach to the current Commission's position, see L.VOGEL, *EU Competition Law Applicable to Distribution Agreements* (above no.1), p.241

[207] *Guidelines*, para.52

[208] The amount should be determined on the basis of objective criteria, such as the buyer's size in the network or its geographic location (*Guidelines*, para.52(c).

[209] The combination of purely qualitative selection criteria with the requirement to achieve a minimum amount of offline sales is an indirect form of "quantitative" selective distribution, which is less likely to produce net negative effects if such an amount does not represent a significant proportion of the dealer's total turnover achieved with the type of products in question and if it does not go beyond what is necessary for the supplier to recoup its relationship-specific investment and/or realize economies of scale in distribution. See ACCARDO, *Vertical Antitrust Enforcement* (above), p. 296, footnote no.220.

[210] Bundesgerichthof [*Federal Court of Justice*] *Depotkosmetik im Internet*, 4 November 2003, 2002 KZR 2, WuW/E DE-R1203–1205, available (in German) at http://dejure.org/dienste/internet2?juris.bundesgerichtshof.de/cgibin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=27989&pos=0&anz=1

exclusivity of the brand product. Similarly, in *Yves Saint Laurent Parfums,*[211]*,* the parties agreed to a minimum purchase requirement in order to maintain continuous supplies and to allow *Yves Saint Laurent Parfums*,to concentrate distribution on the cost effective retail outlets, which, consequently, rationalises the spread of the costs associated with the distribution of its products and with the provision of assistance to retail outlets. In particular, such an obligation was a means of ensuring, on the one hand, that the costs borne by the manufacturer will be covered by an adequate volume of business and, on the other, that the authorised retailer will contribute actively to enhancing the brand through customer service that is in line with the reputation of the contract products.

This case law, however came before the 2010 Guidelines and has to be treated with caution today.[212]

Dual pricing is generally considered to be a "*hardcore restriction"* as well.[213]

The Commission, however, provides for an exception to the general prohibition: requiring distributors to pay a price linked to the specific distribution channel may be necessary and can fulfill the conditions of Article 101(3) TFEU[214]in those instances when selling online leads to substantially higher costs for the manufacturer than offline sales or when cross-border services may need to be provided.[215]Case law and the Guidelines provide some guidance on the application of such exception.

In *Groen Trend & Schouten Keukens v AEP Home Products*,[216]a Dutch court ruled that the application of different pricing and warranty conditions by a supplier of branded kitchen appliances based on whether sales were made online or in a bricks-and-mortar shop, was not contrary to the 1999 Block Exemption Regulation, and (former) Art 81 EC (now Art 101 TFEU). In particular, the Dutch court upheld the supplier's argument that Internet retailers provided less added value than specialist shops because, contrary to specialist shops, Internet retailers sold the kitchen appliances to consumers without providing expert advice and without ensuring the proper installation of the appliances at the customer's home.

This resulted in increased costs for the supplier, who often needed to advise consumers on the use and maintenance of the appliances and to solve problems caused by inaccurate or faulty installation of appliances sold via the Internet.

Therefore, when offline sales include home installation by the distributor but online sales do not, the latter may lead to more advice to customers (or complaints from them) and warranty claims for the manufacturer, such that different prices may be justified to cover these higher costs. In that context, a relevant factor to consider is to what extent the restriction is likely to limit internet sales.[217]

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[211] Commission Decision 92/33/EEC in Case IV/33.242 *Yves Saint Laurent Parfums* [1992] OJ L12/24.

[212] See L.VOGEL, *EU Competition Law Applicable to Distribution Agreements* (above no.1), p.241.

[213] According to the *Guidelines* "*an agreement that the distributor shall pay a higher price for products intended to be resold by the distributor online than for products intended to be resold offline is an hardcore restriction*" (*Guidelines*, paras.52 (d) and 64).

[214] *Guidelines*, paras.52(d) and 64.

[215] *Ibidem*, para.64.

[216] Dutch Court, No 79005/HA ZA 06-716, LJN BB7225 (2007), available at http://www.wetboek-online.nl/jurisprudentie/ljnBB7225.html.

[217] The assessment would likely focus on whether different prices that distributors have to pay in the two channels reflect a realistic assessment of the extra cost(s) that the two dealers (offline and online) would bear in completing the sale and whether the price difference is set at an excessive level in order to deter online sales. See Case T-67/01 *JCB Service Commission* [2004] ECR II-49.

On the other hand, the supplier may offer its distributors a fixed fee in order to ensure the efficient operation of their physical outlets, or they may impose the payment of a fee from the authorised distributors (not necessarily online) that engage in cross-border sales.[218]

In particular, a fixed fee can be agreed upon, for instance, to support the services offered by bricks-and-mortar shops or different marketing/demonstrative initiatives.[219] Moreover, when a distributor makes a sale outside "its" territory, like via the Internet, that distributor may be required to pay the distributor located in the territory of "destination" a fee based on the cost of the services (eg warranty repairs or product substitution) performed by the latter, including a reasonable profit margin.[220]Such a restriction may be justified if it is shown to be necessary to remedy free-riding between authorized distributors located in different territories, rather than inducing the distributor not to sell to customers located therein. Conversely, profit pass-over obligations, namely payments that are unrelated to costs effectively borne by the distributor located in the territory of destination, are normally prohibited.[221]

Finally, it has to be noted that the approaches adopted by some national competition authorities or courts on the practice of dual pricing are less restrictive than the position of the Commission.[222]The Dutch Competition Authority for example, prohibits the use of dual pricing only in the event of an abuse of dominant position.[223]

II) Use of Third Party Platforms.

While some distributors may simply set up their own website to sell online, others may find it convenient to form agreements with third party platforms, such as online market places or auction sites, in order to benefit from both the consumer traffic generated by such platforms and additional services (like interface design, payment systems, customer care and international web marketing). Online marketplaces, including online auction

[218] See ACCARDO, *Vertical Antitrust Enforcement* (above), p. 297.

[219] *Guidelines*, para.52(d). The two channels likely face different overhead and continuing costs. Each channel may even face different costs to provide similar services. For instance, while the cost to provide product information on a website is basically fixed (costs would not increase with the number of consumers visiting the website), a shop may be likely to incur higher/variable costs, particularly in certain periods of the year (holidays, back-to-school time, etc). A variable fee that increases with the offline or online turnover would be prohibited, as this would indirectly amount to dual pricing.

[220] *Guidelines*, para.50, note 4. If the supplier decides not to reimburse its distributors for services rendered pursuant to a Union-wide guarantee, under which all distributors are normally obliged to provide the guarantee service and are reimbursed for this service by the supplier, even in relation to products sold by other distributors into their territory, then this would be considered a prohibited restriction on the distributors' sales outside their territory. See also Case T-67/01 *JCB Service v Commission* [2004] ECR II-49, paras.136–45, where the Court held that it was important to know
whether the amount of the fee imposed on the exporting dealer was a realistic assessment of the cost of after-sales service that the recipient dealer would have to provide or whether it was set at an excessive level in order to deter exports; see also *SPEA v GCAP and Peugeot*, Paris Court of Appeal of 21 September 2004, upheld by the French Supreme Court, 17 January 2006: the Paris Court of Appeal held that subsidies granted to dealers that were based close to frontiers and faced competition from cross-border agents and independent resellers were not anticompetitive.

[221] *Guidelines*, para.50.

[222] See L.VOGEL, *EU Competition Law Applicable to Distribution Agreements* (above no.1), p.241.

[223] Report of the Competition Authority of the Netherlands, June 2009.

platforms, are heavily used by consumers, so it follows that distributors, especially the small ones, often need to offer their products through these gateways.[224]

The Vertical Guidelines state that use of third party platforms by authorized distributors shall be done "*only in accordance with the standards and conditions agreed upon between the supplier and its distributors for the distributors' use of the Internet.*"[¨] Nevertheless, the language used in the Vertical Guidelines may arise different interpretations. In particular, it is not clear whether "*the standards and conditions*" relate only to quality issues, like those discussed above for the distributors' website, or whether they can go as far as to prohibit the use of certain online channels (e.g. all auction sites) or third party platforms (e.g. eBay or Amazon), provided that such standards and conditions do not amount to a *de facto* prohibition of all internet sales. The ECJ's ruling in *Pierre Fabre* clarified only that a ban of all Internet sales is a hardcore restriction on passive selling, but did not address the issue as to whether certain forms of internet sales may be prohibited.[225]

The Guidelines appear to suggest that the less restrictive solution is the one preferred.[226] Indeed, the example provided therein indicates that, "*where the distributor's website is hosted by a third party platform, the supplier may require that customers do not visit the distributor's website through a site carrying the name or logo of the third party platform*."[227]The example appears to suggest that the manufacturer cannot go as far as banning a specific online platform, but they can require a technical solution whereby customers do not access the distributor's website through a site carrying the name or logo of the third party platform.[228]If so, the "*standards and conditions*" would likely concern quality requirements, such as presentational aspects or the type/quality of services that the "hosting platform" should provide to customers.

However, at the national level, there are examples that support a different solution to this issue. For instance, two German courts recently adopted a rather lenient approach towards restrictions on internet sales via auction websites.[229]

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[224] Small companies may save significant savings using intermediary services, because in this way they do not have to maintain websites. Additionally, small companies that sell through their own website are likely to have less traffic coming to and from the site than intermediaries do. As a result, consumers are more likely to find the individual company's products if they are sold through intermediaries. See ACCARDO, *Vertical Antitrust Enforcement* (above), p. 292.

[¨] *Guidelines*, para.54.

[225] See A. THEMELIS, "*After Pierre Fabre: the future of online distribution under Competition policy"*, *Journal of Law and Information Technology*, September 2012, p. 346-369 (hereinafter "THEMELIS, *After Pierre Fabre"*), p. 352.

[226] See ACCARDO, *Vertical Antitrust Enforcement* (above), p. 293. For a different interpretation, see L.VOGEL, *EU Competition Law Applicable to Distribution Agreements* (above no.1), p.241.

[227] *Guidelines*, para.54.

[228] An example of such a technical/commercial solution was the cooperation between Amazon.com and Borders.com (now terminated and subject to an antitrust dispute in the US). Borders had previously, and unsuccessfully attempted to operate its own website. Under the agreement, Borders' website addressed directs shoppers to what is known as a "mirror website", a site hosted by Amazon. Amazon provided, inter alia, the inventory listing, website content, customer service, sales, etc, to Borders. The commercial terms of the agreement were quite peculiar, because the books purchased through the mirror site were sold and shipped by Amazon, with Borders receiving a commission for each book sold. Amazon would select the books offered, their prices, and the terms of the sales. See ACCARDO, *Vertical Antitrust Enforcement* (above), p. 292, footnote no. 208.

[229] See *Amer Sports*, Higher Regional Court of Munich 2 July 2009, U (K) 4842/08; *Scout-Schulranzen*, Higher Regional Court of Karlsruhe 25 November 2009, 6 U 47/08.

According to the German courts, the manufacturer may legitimately prohibit its distributors from reselling its products through auction websites (such as eBay), insofar as such a restriction would amount to a quality requirement related to Internet sales, while distributors remain free to sell online using other means than auction websites.[230] Although these judgments are not undisputed in Germany,[231] other courts in Europe have taken a similar approach.[232] This issue, therefore, may warrant further specific guidance from the Commission and/or the EU Courts in order to avoid inconsistent solutions at the EU and national levels.

[230] See M. HELD, "*The More Lenient Approach of German Courts Towards Prohibition of Distribution via Internet Auction Platforms—Recent Developments*" (2010) 31(9) *European Competition Law Review,* p.343. For instance, the Higher Regional Court of Munich recently allowed *Amer*, a manufacturer of sports products, to prohibit its distributors from reselling its products through auction websites, such as eBay. The prohibition of *Amer*'s customers from reselling to undertakings that themselves used this form of distribution (ie a restriction on indirect sales through these websites) was found to be equally lawful. *Amer* argued that such a restriction on its distributors and their respective customers was merely a quality requirement related to Internet sales, which was comparable to quality requirements that may be imposed in relation to bricks-and-mortar sales as well as advertising and promotional activities. The circumstances of the case are quite singular. *Amer* did not have a selective distribution system in place and, in fact, its distributors were free to sell via the internet using other means than auction websites, a circumstance that may have convinced the court that the prohibition at stake was not a total ban on internet sales. A few months later, the Higher Regional Court of *Karlsruhe* followed the same line of reasoning in a case concerning the distribution of Scout's satchels and backpacks on eBay. Unlike in the *Amer* case, though, Scout had a selective distribution system in place. Interestingly, the Karlsruhe Court further clarified that the validity of a restriction to distribute through internet auction platforms is not only limited to luxury products, but could equally be imposed in relation to branded products that manufacturers consider to be top-of-the-line products on the basis of their objective characteristics and for which they lay down qualitative selective distribution criteria aiming to adequately present the whole range of products, the provision of competent advice and the maintenance of the brand image.

[231] The judgments of the Higher Regional Courts of Munich and Karlsruhe are not undisputed. In fact, the District Court of Berlin in two cases held that an overall prohibition of selling through eBay was not admissible. These two cases also concerned the distribution of school bags through auction websites (District Court of Berlin, 24 July 2007, 16 O 412 Kart; District Court of Berlin, 5 August 2008, 16 O 287). According to the District Court of Berlin, a prohibition is admissible only if quality standards -that might only exist for premium and luxury products- are disregarded. Moreover, the German Federal Supreme Court has held that a general prohibition of marketing products on the Internet does not comply with the requirements of antitrust laws. See (*Depotkosmetik im Internet*, above*)*; see also Decision of the German Cartel Office in Case B 3-123/08, *CIBA Vision Vertriebs GmbH* (25 September 2009) concerning anticompetitive agreements on the exclusion of internet trading and, in particular, the prevention of the eBay trade in certain contact lenses) available at
http://www.bundeskartellamt.de/wDeutsch/download/pdf/Kartell/Kartell09/B3-123-08.pdf.

On 25 September 2009, the German Federal Cartel Office levied a fine of €11,5 million against contact lens provider CIBA Vision GmbH for fixing minimum resale prices and restricting internet and wholesale sales of its products. CIBA employees systematically monitored retail prices for CIBA contact lenses charged by Internet retailers to consumers; furthermore, CIBA requested its retailers to commit not to sell certain CIBA contact lenses via the internet, and they also prevented sales via eBay by asking eBay to delete any mention of its products on eBay's website. For a comment on the CIBA case, see T. CASPARY, "*Swimming Against the Zeitgeist*" (2010) 31(3) *European Competition Law Review,* p.125.

[232] In the *Cosmetics* case, some of the conditions regarding the quality of the distributor website indirectly prevented distributors from using certain third party platforms (French Competition Authority Decision No 07-D-07 concerning *Cosmetics*). In particular, the French Competition Authority agreed that third party

CONCLUSIONS

"*The promotion of online sales is extremely important for the internal market in Europe because it broadens the market, improves the choices for customers, and generally speaking, enhances competition. But that doesn't mean that we should treat online sales differently from offline sales or ignore possible free-riding problems that may occur between offline and online sales (. . .) We have tried to find a balance between strongly promoting online sales on the one hand, and on the other hand, requirements that are indispensably linked to the branding and the sales of certain products.*" [233](Alexander Italianer, Director General for Competition, European Commission, April 2011)

The European competition law applicable to distribution agreements seems to have entered into a new stage of debates which undoubtedly announce deep evolution.

The Regulation 330/2010 and the accompanying Guidelines on Vertical Restraints modified the extent of the allowed selective distribution according to Art. 101 TFEU and emphasized the distributors' ability in any type of distribution system to use the Internet.

In *Pierre Fabre* case the European Court of Justice stated that, in the context of a selective distribution system, a contractual clause resulting in a *de facto* ban of online sales, constitutes a "*restriction by object"* under the meaning of Article 101(1) TFEU. Thus, the Court confirmed, for the first time in EU case law, the general principle of the "prohibition to prohibit" online sales clearly stated in the new Guidelines.

Despite such a confirmation, the *Pierre Fabre* Judgment could be interpreted as a quasi-absolute prohibition, as it seems to allow two possible justifications of bans on Internet sales: the *"objective justification"* related to the nature of the products in question and, as a last resort, an individual exemption. Nevertheless, given the harshness of the conditions set down by the Judgment, the possibility of being "objective justified" or of benefitting from an individual exemption is limited to exceptional circumstances, and leaves little hope for any possible exceptions to the prohibition on banning Internet sales.

In the case at hand, the Court of Justice seems to have favoured a traditional, legal and formal approach based on the characterization of the restriction, which poses a *per se* prohibition regardless of the effects of the practices and of the state of competition on the market. Even though the Court had stated, as a preliminary point, that the content of the clause, its objectives, and the economic and legal context of which it forms a part should be taken into consideration in order to establish a restriction by object,[234]however the anticompetitive object of the prohibition of Internet sales was established on the basis of an abstract formula rather that an economic analysis of inter-channel, intra and inter-brand competition. [235]

platforms that act as intermediaries raised serious issues in terms of vendor identification and product authenticity, and therefore concluded that the fears of illegal sales (i.e. of counterfeit products or of original products sold by vendors who are not licensed by the selective distribution network) justified the exclusion of this sales channel, until platforms could provide additional guarantees concerning the quality and the identity of online sellers.

[233] Interview with Dr Alexander Italianer, Director General for Competition, who summarized the core of the Commission Policy. See European Commission, *The Antitrust Source*, April 2011, available at http://www.americanbar.org/content/dam/aba/publishing/antitrust.source/apr11-fullsource.pdf.

[234] ECJ, *Pierre Fabre*, paras. 35-39.

[235] See Chapter II, para.1.1, *Confirmation of the principle and assessment of the Judgment,* p.24. See also L.VOGEL, *Efficiency vs Regulation* (above, Chapter II, note no.3), p. 282.

Conversely, in the past few years the Commission has made significant effort in order to move away from the criticized form-based approach, promoting more widely recognized assessment methods based on economic analysis, also referred to as effect-based approach,[236]except perhaps in matters concerning the Internet.[237]Alexander Italianer, the Director General for Competition of the Commission, has recently affirmed that "*Courts should look at the facts specific to the business, the situation before and after the constraint was put in place, and the nature of the restraints as well as their actual or probable effect.*"[238]

Competition law has become the setting for a new conflict between the new and the traditional approach.

Nevertheless, the stakes at play are not only of a legal or economic nature, but they are also political: both the Court of Justice and the Commission want to encourage the development of Internet distribution, because it constitutes a new method of trading and it is also seen as the perfect means for the creation of the internal market intended by the Treaties.[239]It is possible to note that in European law, when the opening up of markets is at stake, the competition authorities have always been inclined to sanction the restriction exclusively with regard to its object, dismissing any effects-based analysis.[240]

The *Pierre Fabre* judgment seems to have fixed for a moment the substantive law, stating that it is forbidden to ban Internet sales. The emphasis, instead, should be given on the more crucial question as to how distributors can use the Internet within a virtual marketplace where distributors have multiple methods of reaching consumers and consumers' shopping trends and abilities in satisfying their commercial necessities evolve in parallel to technological developments.[241]

Despite such a ban to prohibit online distribution, the possibility to limit and to regulate this method of selling remains. EU competition law and case law allow several limitations of Internet sales in the context of a selective distributions system, which are acceptable only in presence of other legitimate requirements whose aim is in fact an overall improvement of competition in relation to factors other than price. The Vertical Guidelines provide some guidance about qualitative restrictions on authorised dealers, such as quality standards requirements on websites, conditions to provide specific services to online customers, and physical shop requirements. For example, according to the Guidelines and case law, the *Pierre Fabre* condition of the presence of a qualified pharmacist must not lead to a *de facto* ban of Internet sales, but could allow PFDC to

[236] See LEAR, *Vertical Restraints in Electronic Commerce: an economic perspective*, p.3. On the Internet distribution issue, the Commission appears to stand in-between these two views. See THEMELIS, *After Pierre Fabre* (above), p. 367.

[237] See, for example, *Observations de la Commission des Communautes Europeennes en application de l'Article 15, paragraphe 3 du Reglement n° 1/2003 dans l'affaire Pierre Fabre*. Intervention dated 11 June 2009 (above, Chapter I, para.2.1).

[238] Alexander Italianer, Director General for Competition, European Commission, *Competitor Agreement under EU Competition Law*, 40th Annual Conference on International Antitrust Law and Policy, Fordham Competition Law Institute New York, 26 September 2013, p.2.

[239] See L.VOGEL, *EU Competition Law Applicable to Distribution Agreements* (above, Chapter II, no.2), p. 236 and D. MARESCA. "*The importation of the rule of reason in European competition law: the implications of economic and behavioral theories and the case of Port services*", August 2012 (unpublished), p.23.
Available at: http://works.bepress.com/davide_maresca/1

[240] L.VOGEL, *Ibidem*.

[241] See THEMELIS, *After Pierre Fabre* (above), p. 352.

require an equivalent for online sales. The result could be "on-line" advice or advice provided through a "hot-line" service.[242]

Conversely, quantitative limitations , such as volume caps and dual pricing, are generally considered to be hardcore restrictions.

The present debate of competition law way of addressing online sales is particularly important as it illustrates a larger conflict within competition law, which is added to the economic issue of online sales regulation in a transition phase between a physical and a mixed method of distribution combining physical and online sales, the so-called "*click&mortar*"[243]form of distribution. The approach to this issue should take into account that these two markets have different characteristics, and demonstrate dissimilar conditions of competition.

In *Pierre Fabre* case, the Court of Justice had the opportunity to admit that, for certain products, sale over the Internet is not appropriate, at least in order to attain the economic efficiencies allowed elsewhere in other circumstances. The Court, however, adopted a restrictive approach, holding that maintaining a prestigious image of the goods, usually considered to be decisive under the rules of selective distribution, is not a legitimate aim for restricting competition.[244]

Moreover, ECJ had the possibility to assess the extent of the requirements for the individual exemption provided by Art. 101(3) TFEU, an issue which could be clarified only by case law, but the Court did not seize such an opportunity, as it considered it did not have sufficient information.[245]

In the current state of law and with reference to the *Pierre Fabre* rulings, the most advisable strategy that a firm could adopt under competition law perspective is taking preventive measures to demonstrate a priori that an agreement does not fall within the prohibition of Art.101(1) TFEU, considering the strict interpretation of the concept of *"objective justification"* provided in *Pierre Fabre*[246]and the formal approach used by the Court of Justice. Indeed, if the Authorities assume the existence of a *restriction by object* according to Art. 101(1), unless the possibility of benefitting of the provision of Art.101(3), it seems almost impossible to justify such a restriction with the benefit of an individual exemption.

The Court of Justice, in identifying the anti-competitive object of a restraint, should focus on the content of the provisions, as well as on the objectives and the economic and legal context of the constraint. The Court should find a balance between the "*per se rule*"

[242] But the requirements of advice 24 hours a day or seven days a week, which does not exist for "brick and mortar" shops, had to be reduced to hours similar to those of shops. However, the requirement for an immediate response, which characterizes the advice of a pharmacist at a physical point of sale, was refused as being disproportionate for Internet sales. According to the French competition authority, this would result in making these sales impossible. It has therefore required that the time limit for responses from a hot-line is not too short, accepting however, depending on the company, varying time limits (from 12 to 72 hours), thus proving that it does not intend to regulate the matter too strictly and replace the company's freedom of choice. See French Competition Authority Decision No 07-D-07 concerning *Cosmetics*.

[243] See NCA Opinion on the e-commerce (above, Chapter II, no.6), para.14.

[244] ECJ, *Pierre Fabre*, para. 46.

[245] ECJ, *Pierre Fabre,* para.50.

[246] See Chapter II, para. 1.2.

approach actually used in *Pierre Fabre* and the "rule of reason" reason" [247]taking into account also the circumstances of the restriction.

In conclusion, in order to build a more effective law on this issue, it is possible to note that:

- the approach of the ECJ and the Commission should take into account that "physical" and "online" markets have dissimilar features, with different conditions of competition;
- the identification of the anti-competitive object of a restraint should be based on the content of the provisions, but also on the objectives and the economic and legal context of the constraint. Apart from classic restrictions like price fixing, output limitations and sharing of markets and customers, there are other, more ambivalent situations, where a contextual effects-based analysis can either cast doubt on or confirm the anti-competitive object of an agreement;[248]
- the extent of the four requirements for benefitting of the individual exemption provided by Art. 101(3) TFEU should be better assessed by European case law;
- under an economic perspective, transferring on the Authority the burden of proving an agreement to be anticompetitive would generate fewer errors and enhance consumer welfare.[249]

It is clear that Internet distribution has not found its balance yet, and the *Pierre Fabre* case, in all likelihood, merely constitutes a step towards the construction of a truly efficient law.

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[247] For an overview of the European parameters of the "rule of reason" and the difference between the US and the EU approach, see D. MARESCA. "*The importation of the rule of reason in European competition law"* (above). According to the US doctrine, developed within the Chicago School, a restraint of trade could be justified by showing an advantage for consumers by way of a reasonableness test. According to the rule of reason theory, courts and administrative powers always have the obligation to let companies explain and prove the reasonableness of the effects of the agreement.

[248] See Alexander Italianer, Director General for Competition, European Commission, *Competitor Agreement under EU Competition Law*, 40th Annual Conference on International Antitrust Law and Policy, Fordham Competition Law Institute New York, 26 September 2013, p.5.

[249] See LEAR, *Vertical Restraints in Electronic Commerce: an economic perspective* (above Chapter II, no.2), p.5.

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