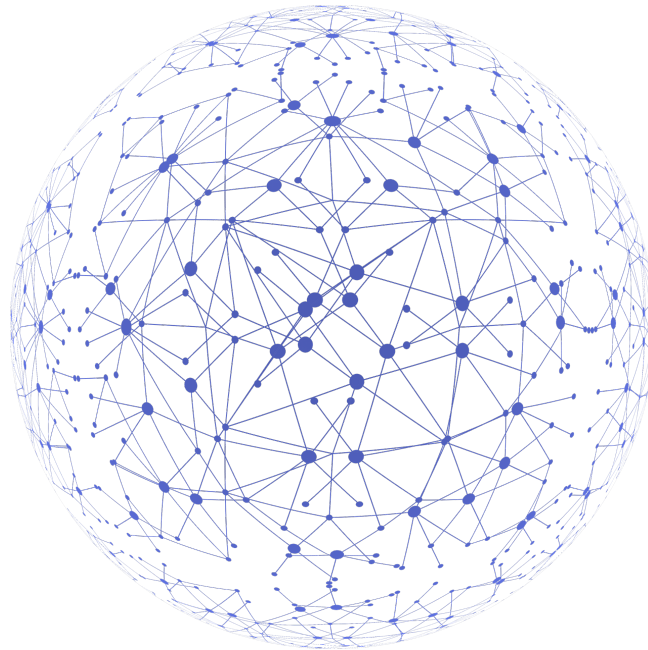




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Luxury Goods in E-Commerce

The Judicial Relevance of the Luxury-Concept when Selective
Distribution Networks Prohibit Online Distribution

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Abstract

There are situations where suppliers of luxury goods enter into vertical agreements with certain retailers regarding the distribution of the goods. Through these so-called selective distribution networks suppliers might impose restrictions of the online distribution of the luxury goods. The purpose of this thesis is to research the judicial relevance of the luxury-concept in regard to the legality of setting up selective distribution networks that restrict online distribution, based from the perspective of EU Competition law.

A selective distribution network inherently restricts competition by object. It is thus directly prohibited under Article 101(1) TFEU. In order for such a network to be objectively justified it has to fulfil the following cumulative criteria:

1. It has a legitimate objective to maintain the distributed goods' proper use or quality.
2. The distributors are chosen on the basis of objective criteria of a qualitative nature that are laid down uniformly for all distributors and applied in a non-discriminatory manner.
3. It is proportionate in regard to the attainment of the legitimate objective.

A selective distribution network can also benefit from a block exemption under the Vertical Block Exemption Regulation, provided that the supplier's and the distributors' market shares do not exceed 30 % each in the relevant market and the network does not contain a hard-core restriction. The National Competition Authority or the European Commission can withdraw a block exemption if it is assumed with sufficient certainty that the network will not fulfil the conditions stipulated in Article 101(3) TFEU. The individual assessment in Article 101(3) TFEU can exempt a selective distribution network if the network's efficiency-enhancing effects outweigh its anti-competitive effects.

The luxury-concept is multifaceted. It consists of several components that are vital for the creation of a luxury brand. The luxury-concept is not solely connected to the material features of a product, but also to the consumer's distinctive perception regarding the product as luxury. The luxury image of luxury goods may be diluted if it

is distributed online. The CJEU consequently establishes that the preservation of the luxury image constitutes a legitimate objective to set up a selective distribution network. The CJEU furthermore allows restrictions on the use of third-party platforms in order to protect the goods' luxury image. Such restrictions can also benefit from the block exemption in the regulation.

Non-luxury goods do not obtain the same protection as luxury goods. Restrictions of online distribution for non-luxury goods would presumably always be considered disproportionate under the assessments in both Article 101(1) and Article 101(3) TFEU. For luxury goods the result of the analysis is not as definite. There are arguments both for and against the possibility of objectively justifying selective distribution networks for luxury goods that *de facto* prohibit all online distribution. The CJEU has irrespective of this already allowed restrictions on the use of third-party platforms for the distribution of luxury goods. The luxury-concept is therefore considered to be judicially relevant for the legality of selective distribution networks that restrict online distribution.

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Table of Abbreviations & Terminology¹

Branded goods - Goods from a supplier that is easily distinguishable from other similar goods by other suppliers. These types of goods are normally protected through a trademark.

Brick-and-mortar stores – A physical store where the products are marketed and sold to customers.

CJEU – The Court of Justice of the European Union.

Commission – European Commission.

Horizontal Agreements – Agreements between companies at the same level of the supply chain (e.g., agreements between two or more suppliers).

Intra-brand competition - Competition where distributors compete against other distributors in regard to goods from one supplier.

NCA – National Competition Authority.

Selective Distribution Network – A vertical agreement between a supplier and distributors restricting the number of authorized distributors based on qualitative or quantitative selection criteria.

TEU – Treaty on European Union.

TFEU – Treaty on the Functioning of the European Union.

Third-Party Platforms – An online-based intermediary that connects sellers with buyers (e.g., Amazon and Ebay).

VBER – Vertical Block Exemption Regulation.

Vertical Agreement – Agreements between businesses at different levels of the supply chain (e.g., agreements between suppliers and distributors).

¹ The terms have partly been defined in *A Dictionary of Law* by Jonathan Law and partly in the context of the material. See Law, Jonathan, *A Dictionary of Law*, (Oxford: Oxford University Press, 9th edition, 2018); See also Wartinger, Stefan & Solek, Lukas, "Restrictions of Third-Party Platforms within Selective Distribution Systems", 39 *World Competition* 2 (2016), 291-306, p. 291 et seq.

1 The New Era of E-Commerce

As the Internet has established itself as a major market platform for the distribution of goods, suppliers also have a keen economic interest of making their goods available online. In order to protect the value of luxury goods some suppliers set up distribution channels. These so-called selective distribution networks limit the number of authorized distributors unless they fulfil specific selection criteria. However, these types of arrangements are far from unproblematic in EU Competition law.

1.1 Background

1.1.1 The Dilution of Luxury Goods

E-commerce as a phenomenon has grown successively over time. This growth is also reflected in the increased number of e-shoppers, mostly among young Internet users.² Purchasing goods online entails a higher level of convenience and accessibility for the consumer. The transparency on the Internet enables consumers to evaluate product information, compare factors such as price and quality and subsequently make wise purchase decisions.³ E-commerce has consequently increased the consumer welfare.⁴

Suppliers might distribute its branded goods (i.e., a product that is publicly distinguished from other goods) through brick-and-mortar stores or online. The distribution of goods online can in turn be done in the supplier's own official website or via third-party platforms (i.e., intermediaries between sellers and buyers) for

² E-commerce statistics for individuals, available under <https://ec.europa.eu/eurostat/statistics-explained/pdfscache/46776.pdf>, Eurostat. Data extracted in December 2018.

³ Kinsella Obe, Stephen et al., "Comments on the CRA Paper Entitled 'An Economic Analysis of the Use of Selective Distribution by Luxury Goods Suppliers'", 5 *European Competition Journal* 1 (2009), 227-260, p. 230.

⁴ The concept of consumer welfare is defined in the dictionary work by Cane, Peter & Conaghan, Joanne, *The New Oxford Companion to Law*, (Oxford: Oxford University Press, 2009). "It is noted in the definition of efficiency in competition law that the various types of efficiency can move in different directions. (...) A standard is required in order to determine whether the conduct is positive, negative or neutral. The consumer welfare standard takes the view that competition is protected for the benefit of consumers and that consumers benefit from low prices. According to this standard (...) the law should prohibit conduct that results in increased prices. The consumer welfare approach is subject to a number of criticisms. First, allocative efficiency is not necessarily a good measure of welfare. (...) Secondly, it assumes that consumers are a discreet and homogeneous section of society that all benefit in the same way. Thirdly, other efficiencies are sacrificed and these might outweigh the benefits to consumers."

example Amazon and Ebay.⁵ It is not uncommon for suppliers to distribute its branded goods via retailers through license agreements. The licensees might themselves distribute the goods via third-party platforms. There is accordingly a variety of distribution channels, each differentiated with particular benefits and shortcomings.

Suppliers of luxury goods tend to prohibit the licensees' possibilities to distribute the branded goods online. The main reason, claimed by numerous authors, is a growing concern from suppliers that online distribution might negatively affect the public image of the brand. It is argued that the brand image of luxury goods and the channels where the goods are distributed in are closely linked.⁶ For this purpose suppliers set up so called selective distribution networks.

1.1.2 The Protection of the Luxury Image

A selective distribution network is a system wherein only authorized distributors are able to sell the supplier's goods to end-consumers. The distributors are granted admission into the network based on various selection criteria. The selection criteria can be either qualitative or quantitative. Qualitative selection criteria relate directly to the nature of the goods. These are exemplified by the European Commission as objective criteria related to *inter alia* "training of sales personnel, the service provided at the point of sale, a certain range of the products being sold etc."⁷ A quantitative selection criterion relates on the other hand to the number of distributors for example by "requiring minimum or maximum sales, by fixing the number of dealers, etc."⁸

⁵ See Wartinger, *supra* note 1, p. 294 et seq.

⁶ *Ibid.*, p. 291 et seq; See also Rigaud-Lacresse, Emmanuelle et al., *New Luxury Management – Creating and Managing Sustainable Value Across the Organization*, (Switzerland: Springer International Publishing, 2017), p. 113 et seq; See also Buettner, Thomas et al., "Selective Distribution by Luxury Goods Suppliers: A Response to Kinsella Et Al", 5 *European Competition Journal* 2 (2009), 613-621, p. 615.

⁷ Commission Notice on Guidelines on Vertical Restraints (2010) (Guidelines on Vertical Restraints) OJ C130/1, para. 175.

⁸ *Ibid.*

The overall intent of a selective distribution network is to prevent authorized distributors from selling the goods to unauthorized distributors outside the network.⁹

The selective distribution network might solve the so-called free-rider problem that suppliers often face. The free-rider problem might occur in situations where market participants that do not invest in enhancing the brand image receive the same economic benefit as those market participants that do invest.¹⁰ The theories of the free-rider problem assume that preserving the brand image is worth the effort and consequently that the brand image is an asset. It is therefore presumed that suppliers are more inclined to set up a selective distribution network regarding goods that are attached with a luxury image.¹¹

A supplier that restricts online distribution for its goods through a selective distribution network will undoubtedly limit the number of authorized distributors within the network especially with respect to market participants that are strictly online based. Selective distribution networks will therefore have anti-competitive effects on intra-brand competition. Intra-brand competition is competition where distributors compete against other distributors regarding the goods by one supplier.¹²

The incentives to set up a selective distribution network and prohibit online distribution are presumably stronger for suppliers of luxury goods. Authorized distributors are simultaneously more inclined to distribute the luxury goods online, due to the importance of e-commerce. The follow-up question to that is in what way does the luxury-concept affect the legality of a selective distribution network where the supplier imposes restrictions of online distribution in order to protect the luxury image of its goods?

⁹ Materljan, Igor & Materljan, Gordana, "Selective Distribution of Trademarked Products and Restrictions of Online Sales", *EU and Comparative Law Issues and Challenges Series 3* (2019), 830-865, p. 831.

¹⁰ Buccirosi, Paolo, "Vertical Restraints on E-Commerce and Selective Distribution", 11 *Journal of Competition Law & Economics* 3 (2015), 747-773, p. 751.

¹¹ Marsden, Philip & Whelan, Peter, "Selective distribution in the age of online retail", 31 *European Competition Law Review* 1 (2010), 26-37, p. 26 et seq.

¹² See Buccirosi, supra note 10, p. 749.

1.2 Purpose & Questions

The purpose of this thesis is to research *the judicial relevance of the luxury-concept in regard to the question of whether selective distribution networks that prohibit the distribution of luxury goods online are legal, based from the perspective of EU Competition law.*

The purpose necessitates establishing the legal status of selective distribution networks within the EU. It will also be necessary to dissect the multidimensional character of the luxury-concept from a business-related perspective. The examination will thus focus on how the luxury-concept is reflected in the supplier's business efforts to maintain the luxury image of its goods. This will be done in order to understand and establish how the luxury-concept is interpreted and applied in relevant case law from the CJEU and thereby its judicial relevance for the legal status therein.

In accordance with what has been proposed in the above-mentioned paragraphs, the following questions need to be researched and answered in order to fulfil the purpose of the thesis:

1. Are selective distribution networks that prohibit online distribution of luxury goods legal in EU Competition law?
 - 1.1 Is the answer of Question 1 applicable for non-luxury goods?
 - 1.2 Is the answer of Question 1 applicable irrespective of the extent of the restriction of the online distribution?

2. What are the characteristics and components of the luxury-concept from a business-related perspective and how are these reflected in the supplier's business-efforts to maintain the luxury image of the goods?

1.3 Delimitations

The thesis will be written in English. The subject matter deals with the complexities of EU Competition law and is therefore relevant for EU Member States. The majority of the articles, journals and other types of relevant sources are also written in English. It is therefore only logical that the language of the thesis reflects the subject matter's international character.

The situation that is the pivotal point in the thesis is when a supplier and a distributor disagree regarding a selective distribution network for luxury goods that prohibits online distribution. Provisions that do regulate selective distribution networks but are not relevant to this specific situation will not be thoroughly examined.

Only precedent cases will be scrutinized. Cases or parts of the cases that have affirmed the reasoning of preceding cases and have not provided with anything new to the topic will be left aside in the discussion. Parallel to this, only the parts that strictly focus on EU Competition law will be discussed even though there might be some form of convergence between EU and National Competition law.

The subject matter of the thesis is closely connected to European Intellectual Property law. Nonetheless, this is solely a thesis delving into the sphere of EU Competition law. It will therefore always be implicitly presumed that luxury goods have been granted a trademark. The author of the thesis nonetheless welcomes efforts from other authors to focus on the aspects of the subject matter that are related to European IP law.

1.4 Outline

The following Chapter 2 will identify and explain the methods that were applied in the thesis and the material that was processed.

Chapter 3 will present the theories of the luxury-concept and provide the reader with an understanding of what constitutes as luxury and how luxury brands are created.

In Chapter 4 the intention is to provide a research of the legal status of selective distribution networks in EU Competition law.

In Chapter 5 the luxury-concept and its judicial relevance will be analysed regarding the set up of a selective distribution network that prohibits online distribution.

The final Chapter 6 will summarize the research from previous chapters and provide with conclusions to the purpose of the thesis.

All material will be reported and compiled in the bibliography on the final pages.

2 Methodology & Material

2.1 Traditional Legal Dogmatic Method

2.1.1 Sources of Law

In order to fulfil the purpose of the thesis a traditional legal dogmatic method will be applied. A legal dogmatic method entails determining the legal status based on the sources of law. The sources of law are significantly, but not exclusively, written rules, preparatory works and case law.¹³ The practice of the method corresponds with the first question in Chapter 1.2 Purpose & Questions. This entails researching the sources of EU Competition law, such as treaties, regulations and case law from the CJEU. The analysis will accordingly be strictly based on *de lege lata* (i.e., a classification of arguments dealing with the law as it is) in contrast with *de lege ferenda* (i.e., arguments dealing with the law as it should be).¹⁴ The research will thus reflect the practical approach of judges in cases, when dealing with the sources of law.¹⁵

It is imperative that the sources of law are interpreted correctly in order to objectively determine *de lege lata* through syllogism. The validity of the sources of law will therefore be based on their mutual judicial hierarchy and understood through relevant methods of interpretation.

2.1.2 Interpretation Method: Textual & Teleological

The principal methods of interpretation will be both textual and teleological. Different authors use different terminology for the method of textualism, such as literal interpretation or grammatical method, however the meaning is nevertheless the same. Textualism is based on the explicit text of the provision as it is currently written. The

¹³ Sandgren, Claes, *Rättsvetenskap för uppsatsförfattare – Ämne, material, metod och argumentation*, (Stockholm: Nordstedt Juridik, 4th edition, 2018), p. 45 et seq & 49.

¹⁴ *Ibid.*, p. 48 et seq.

¹⁵ Svensson, Eva-Maria & Gunnarsson, Åsa, *Genusrättsvetenskap*, (Lund: Studentlitteratur, 1st edition, 2009), p. 93.

teleological interpretation on the other hand takes into account the purpose and objectives of the provision as the main factors of interest.¹⁶

Traditionally speaking, a teleological approach has been strictly neglected by users of legal dogmatic method as it may conflict with the presumable objectivity and safety margin of a correct result that the method is supposed to guarantee.¹⁷ A teleological interpretation method will however be of pivotal importance when dealing with sources of law deriving from EU Competition law.

The framework of the EU is independent. The EU has its own legislative institutions and its own body of laws that has precedence over domestic law.¹⁸ The EU legal order is intrinsically characterized as functional and purpose driven, wherein the overall aim in achieving the main objectives of EU law will have precedence over the literal interpretation of a provision.¹⁹ There will accordingly always be a need to take into account the main objectives of EU Competition law, necessitating an application of a teleological interpretation method. The teleological interpretation method has therefore never been as relevant and important as in a EU-context.²⁰ A teleological interpretation method will therefore always be more relevant and have superiority over textualism in cases of conflict. How this is reflected in the sources of EU Competition law is discussed in Chapter 2.3.1 and concretized in Chapter 4.1.1.

2.2 Legal Analytical Method

The purpose of the thesis is not only to describe the legal situation, it is also to analyse the judicial relevance of the luxury-concept. It is not presumed that the explicit text of the sources of law will give definite answers to the questions stipulated in Chapter 1.2 Purpose & Questions. The purpose of the thesis is in fact strictly analytical. A legal dogmatic method is sufficient in respect to the descriptive part, however, not so much

¹⁶ Lenaerts, Koen & Gutiérrez-Fons, José A., "To Say What the Law of the EU is: Methods of Interpretation and the European Court of Justice", 20 *Colombia Journal of European Law* 2 (2014), p. 8 & 31 et seq.

¹⁷ Zamboni, Mauro & Nääv, Maria (red.), *Juridisk Metodlära*, (Lund: Studentlitteratur, 2nd edition, 2018), p. 37; See also Lenaerts, supra note 16, p. 8 et seq.

¹⁸ CJEU: 15 July 1964, C-6/64, Flaminio Costa v E.N.E.L (1964) (Costa Enel) ECLI:EU:C:1964:66, p. 594.

¹⁹ See Lenaerts, supra note 16, p. 31 et seq.

²⁰ Salachová, Bohumila & Vitek, Bohumil, "Interpretation of European Law, Selected Issues", 61 *Acta Universitatis Agriculturae et Silviculturae Mendelianae Brunensis* 7 (2013), 2717-2720, p. 2718 et seq.

regarding the analytical part. It will therefore be complemented with a legal analytical method. However, in order for the analysis to be comprehensible it will emanate from the established research and result. In this regard it is imperative to emphasize that the analysis will not be based on *de lege ferenda*.

The analysis will be grounded on the result from Chapter 3 and 4. Depending on if the legal status is affected or not by the luxury nature of the goods, the luxury-concept will be more or less judicially relevant. The idea is therefore to compare luxury goods with non-luxury goods in relation to the set up of a selective distribution network that restricts online distribution, and analyse the legal status therein. The analysis requires that the two stipulated questions in Chapter 1.2 have been researched. It will be impractical to analyse the judicial relevance of the luxury-concept if one does not first establish the legal status of selective distribution networks for luxury goods.

The legal analytical method is not as strict as the legal dogmatic method. The method enables the usage of an extended pool of relevant material, not only sources of EU Competition law.²¹ This factor is of vital significance for the analytical part as it deals with the luxury-concept, which has not sufficiently been touched upon in the sources of law. The material will thus be carefully selected and valued based on the author's authority in the field. In case of authoritative statements from the CJEU or guidance from the EU-institutions, these will evidently have precedence over other material. In addition to this, material that represents different interests and perspectives will be processed. The business-related characteristics and components of the luxury-concept will thereafter be determined through the technique of finding common grounds amongst the material. All in all the technique of finding common grounds will implicate a better-founded understanding of the luxury-concept.

Applying a legal analytical method will together with the legal dogmatic method enable the purpose of the thesis to be fulfilled in its entirety.

²¹ See Sandgren, *supra* note 13, p. 50 et seq.

2.3 Material

The material will be reported and compiled in the bibliography on the final pages. The sources of law will be compiled in a chronological order, whereas articles, literature and other literary sources will be compiled in an alphabetical order.

2.3.1 Sources of EU Competition Law

The thesis delves into a subject matter within EU Competition law. The relevant material is therefore primarily sources of law. The sources of law are, within the EU, divided into *inter alia* primary law, secondary law and case law from the CJEU. The norms' hierarchy are in the same order. The primary law consists of treaties, such as the Treaty on European Union (TEU) or the Treaty on the Functioning of the European Union (TFEU). The secondary law in the EU is notably regulations and directives. Whereas directives must be implemented, regulations are directly applicable in each Member State. The treaties are broad in the sense that they stipulate policies and objectives. It is thereafter the secondary law that has the task of providing specific provisions in order to accomplish the objectives.²² The treaties' broadly drafted provisions necessitate a teleological interpretation.

The main source of law that will be used in the thesis is Article 101(1) TFEU.²³ The source will be complemented with Commission Regulation 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted parties (VBER).²⁴ Further help on the interpretation of Article 101 TFEU will be acquired from the European Commission in the form of Guidelines on Vertical Restraints.²⁵ The guidelines are non-binding for the EU courts to follow, but they have nonetheless a high authority on the interpretation of EU law, especially with respect to assessments that are initially

²² Foster, Nigel, *EU Law Directions*, (Oxford: Oxford University Press, 6th edition, 2018), p. 110 et seq & 123.

²³ Treaty on the Functioning of the European Union (2016) (TFEU) OJ C202/1, art. 101.

²⁴ Commission Regulation EU/330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2010] (VBER) OJ L 102/1.

²⁵ See Guidelines on Vertical Restraints, *supra* note 7.

made by the Commission itself.²⁶ Supplementary law in the form of case law from the CJEU will also be amongst the list of material.

As the treaties are higher up in the hierarchy of law in the EU in relation to regulations and directives, Article 101 TFEU will have precedence over the provisions in the VBER. It is in this regard that the teleological interpretation is actualized. The interpretation of a provision in the VBER that is the closest to being in conformity with the treaty text (i.e., the main objectives of the EU) is the one interpretation that will prevail, illustrating the tension between teleological interpretation and textualism.

2.3.2 Other Material than Sources of Law: Books & Articles

The purpose of the thesis encompasses parts that have not sufficiently been discussed in the sources of law. Beyond the acts issued by the institutions of the EU other material will therefore also be processed. The understanding of the luxury-concept in the following chapter will derive mainly from the anthology by Emmanuelle Rigaud-Lacresse et al.²⁷ This work is significant as it coordinates existent literature on the subject matter. It has therefore a high authoritative source value.

It will be of vital importance that valuations and arguments by authors are identified and met with scepticism in order to avoid that the result of Question 1 and 2 in Chapter 1.2 Purpose & Questions is tainted by the authors' subjectivity.

²⁶ Wijckmans, Frank & Tuytschaever, Filip, *Vertical Agreements in EU Competition Law*, (Oxford: Oxford University Press, 3rd edition, 2018), p. 28 et seq; See also CJEU: 13 December 2012, C-226/11, *Expedia Inc. v. Autorité de la concurrence and Others*, ECLI:EU:C:2012:795 (2012) (*Expedia*), para. 24-31.

²⁷ See Rigaud-Lacresse, supra note 6.

3 Theories & Perceptions: The Luxury-Concept

The multifaceted dimension of the luxury-concept requires a thorough research and an equally multifaceted presentation of the concept. The intention in this chapter is, however, to capture the essence of what luxury is and its relation to brands in a version that could be judicially understood and implemented in the courts.

3.1 The Pursuit of a Uniform Definition

Both the author Marie-Claude Sicard and the scholar Alessandro Brun share the same sentiment that a single uniform definition of the luxury-concept is almost impossible. The concept is subjective at its core and has historically been social and cultural relativistic.²⁸ Due to the globalization, the luxury-concept has changed. There are now global luxury brands.²⁹ There are thus certain frequently emphasized characteristics that are highly associated, on a global scale, with luxury-brands and that are desirable for suppliers to achieve. Alessandro Brun emphasizes, based on existing literature on the subject, the importance of *inter alia*:³⁰

- Consistent premium quality and heritage of craftsmanship – for example superior raw material quality and expertise to manufacture the quality products. This includes elements of uniqueness in relation to similar goods.
- Exclusivity – for example through selective distribution. This aspect is according to Brun’s research of relevant literature the most frequently mentioned common denominator associated with luxury brands.³¹
- Marketing and reputation on the excellence of the brand on a global scale – showing the superiority of product quality supplemented with an emotional element for example through enhanced shopping atmosphere and experience reflecting the brand’s values.

²⁸ Sicard, Marie-Claude, *Luxury, Lies and Marketing – Shattering the Illusion of the Luxury Brand*, (London: Palgrave Macmillan, 2013), p. 46 & 64; See also Rigaud-Lacresse, supra note 6, p. 8.

²⁹ Roberts, Joanne, "Luxury international business: a critical review and agenda for research, 15 *Critical perspectives on international business* 2/3 (2019), 219-238, p. 222.

³⁰ See Rigaud-Lacresse, supra note 6, p. 9-10; See also Sicard, supra note 28, p. 66-72; See also Kim, Jau-Eun et al., "Decoding fashion advertising symbolism in masstige and luxury brands", 23 *Journal of Fashion Marketing and Management* 2 (2019), 277-295, p. 278-279.

³¹ See Rigaud-Lacresse, supra note 6, p. 10; See also Kim, supra note 30, p. 283.

- Distinguishable style and design – this includes an emotional appeal, which is not only related to material aesthetics.
- A country of origin signalling a historically good reputation for the product category – for example Italy associated with excellent fashion.
- Signals of a unique lifestyle by acquiring the product.

The majority of these characteristics are not solely related to the material features of a product, they are also accompanied with a marketing-aspect in order to influence the consumers to perceive the products and the brand in a certain way. A definition of the luxury-concept can thus not be derived without understanding what a luxury brand is, how it is created and how it functions.

3.2 The Creation of a Luxury Brand

A brand is a product manufactured by a specific supplier with a distinctive sign (e.g., names, symbols, smells) in order to help consumers distinguish the products from similar products by other suppliers.³² The brand is thus perceived from the perspective of the consumer and the brand image is created therein.³³

There are certain components and branding practices that are necessary for the creation and construction of a luxury brand. These components are *inter alia*:³⁴

- Highlighting for the consumers the attributes of the superior craftsmanship of how the products are made (e.g., Stradivarius violin).³⁵
- Merging human personalities in the brand for example through brand ambassadors (i.e., associating the brand with famous people).³⁶
- Positioning the brand in time. Luxury brands prefer to be timeless from a temporal view through notably its advertisement. Some brands might however take advantage of its historical past.³⁷
- Associating the brand and the interaction with it with symbolic places.³⁸

³² See Rigaud-Lacresse, supra note 6, p. 104-106.

³³ Ibid., p. 70 et seq.

³⁴ See Sicard, supra note 28, p. 79 et seq.

³⁵ See Rigaud-Lacresse, supra note 6, p. 71-72.

³⁶ Ibid.

³⁷ See Sicard, supra note 28, p. 93-94.

³⁸ Ibid., p. 100; See also Rigaud-Lacresse, supra note 6, p. 77 et seq.

- An implicit norm wherein it is perceptually assumed that the brand for example guarantees quality.³⁹
- Positioning of the brand as superior of other brands. A position that is also recognized by the consumers.⁴⁰
- A spiritual power and connection with the brand displaying excellence, perfection and immortality.⁴¹
- The creation of a strong emotional connection with the brand, while simultaneously displaying a certain level of inaccessibility.⁴²

As might be noticed these components are closely linked to the characteristics of the luxury-concept in Chapter 3.1. The luxury-concept is thus intertwined with the brand-concept.

Sicard analyses in her book whether Ralph Lauren could be considered a luxury-brand based on the above-mentioned components. The results are affirmative. She concludes that the components do not need to be fulfilled with a maximum degree in order for a brand to be considered a luxury brand. The components are circularly interconnected and therein equally involved in the construction of a brand.⁴³ However, they may be more or less important depending on the product-category. In fashion it may be more important to merge human personalities with the brand through *inter alia* brand ambassadors. Conversely, for highly technical product categories such as vehicles (e.g., Ferrari) it may be more important to highlight the quality and craftsmanship of the products. The internationally recognized thought leader on brands Jean Noël-Kapferer, however, concludes that a luxury brand can be extended from one product category to another once the luxury brand image has been established. Luxury brand essentially “*do not sell function but hedonism, style, recognition and art.*”⁴⁴

³⁹ See Sicard, *supra* note 28, p. 100 et seq; See also Rigaud Lacresse, *supra* note 6, p. 71-72.

⁴⁰ See Sicard, *supra* note 28, p. 114.

⁴¹ *Ibid.*, p. 114 et seq.

⁴² *Ibid.*, p. 134-135; See also Rigaud-Lacresse, *supra* note 6, p. 30.

⁴³ See Sicard, *supra* note 28, p. 79 & 147 et seq.

⁴⁴ Kapferer, Jean-Noël & Valette-Florence, Pierre, “Beyond rarity: the paths of luxury desire. How luxury brands grow yet remain desirable”, 25 *Journal of Product & Brand Management* 2 (2016), 120-133, p. 122.

3.3 Luxury Brand's Creation of Value

The high price on luxury goods can never be explained by solely considering the quality of the goods. The brand's image creates therefore value in itself.⁴⁵ This is in turn related to the characteristics of the luxury-concept in Chapter 3.1.⁴⁶ However, it is vital that the brand's superiority is communicated to the consumers and translated into a customer experience in order to affect the consumers' perception of the brand.⁴⁷

The customer experience is all the interactions between the customer and the brand through elements that represent the brand. These elements can be *inter alia* brand ambassadors, marketing of the products, store layout and so on that in turn generate different reactions from the customer. The brand image is either positively or negatively affected by the customer experience. Through the customer experience value is reciprocally created for the customer and the brand. The brand's value increase is due to the enhancement of the brand image. The customers on the other hand receive value, *inter alia*, related to the fact that the luxury goods are symbolically connected to an elite lifestyle; with the purchase of the luxury product follows status and social recognition.⁴⁸

Customer experience normally takes place in the brick-and-mortar stores. It is thus important for the suppliers to create a memorable customer experience through certain retail strategies.⁴⁹ Important factors for this purpose is:

- The number of points of sale (i.e., the time and place of a product purchase).
- The retail format (e.g., online stores and discount stores).
- Location of the store within the country.⁵⁰

These factors coincide with the most commonly mentioned characteristic of the luxury-concept, namely exclusivity. Maintaining exclusivity is important for a brand's

⁴⁵ Ibid., p. 121.

⁴⁶ Ibid., p.122.

⁴⁷ See Rigaud-Lacresse, supra note 6, p. 275.

⁴⁸ Ibid., p. 220-222; See also Kapferer, supra note 44, p. 122.

⁴⁹ See Rigaud-Lacresse, supra note 6, p. 220 & 276.

⁵⁰ Ibid., p. 276-279.

luxury image. Setting up a selective distribution network is therefore in line with a functioning retail strategy.⁵¹

3.4 Remarks on the Dynamics of the Luxury-Concept

The characteristics of the luxury-concept are to be understood based on how a brand functions and how a brand's luxury image is created. Luxury goods are therefore priced not only based on the craftsmanship or the quality of the material, but also on the distinctive perception consumers have of the products and the brand. Customers are willing to pay for this extra layer of an intangible luxury image that particular branded products are fortified with.

The value that customers receive is directly dependent on the brand's image. This necessitates in turn a widespread perception of the brand as luxury. Social recognition only arises if non-buyers also recognize the brand as a luxury brand. This is due to the fact that luxury goods are or at least need to be seen as rare and exclusive. The sphere of non-buyers is therefore presumably larger than the sphere of buyers. Luxury goods are accordingly subjectively perceived as luxury goods at an individual level, but the individual subjectivity needs to be publicly shared amongst other groups of individuals. This is also a reason why the marketing of the brand to other consumer groups than presumable buyers is an integral part of the luxury-concept.

Considering the analysis by Sicard presented in Chapter 3.2, there are differences between luxury brands in regard to their luxuriousness and thus their creation of value. Illustrating this fact with an example, Louis Vuitton is one of the highest valued luxury brands globally. Of course the value of a company does not solely depend on the luxury image. It is however undeniable, considering the above research, that the luxury image is a significant part of that. It is thus possible to, with a certain degree of appreciation and leeway, quantify the luxury image in a brand. Some luxury brands might therefore need an extra sphere of protection, as their luxury image will be more valuable than other brands.

If Louis Vuitton bags were sold in disorganized discount stores with abysmal service this would negatively affect the brand's image. A selective distribution network

⁵¹ See Roberts, *supra* note 29, p. 222.

dealing with these issues is therefore assumed to be a brand-enhancing and protective investment. It will be necessary to research how this theoretical understanding of the luxury-concept affects the legality of setting up a selective distribution network. For this purpose see Chapter 4.2.

4 Anti-Competitive or Not: Selective Distribution Networks in the EU

4.1 EU Primary & Secondary Law

4.1.1 Main Objectives

EU Competition law has the main objective of protecting and stimulating competition within the EU.⁵² The main objectives are stipulated in Article 3(3) in the TEU. The Union “(...) *shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress*” (bolded here).⁵³

These objectives are developed in Article 120 TFEU. “*Member States shall conduct their economic policies with a view to contributing to the achievement of the objectives of the Union, as defined in Article 3 of the Treaty on European Union (...) The Member States and the Union shall act in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources*” (bolded here).⁵⁴

The consumer welfare is also a main objective in EU Competition law. The efficiencies garnered by a specific agreement shall thus be allocated to the consumers, through *inter alia* better prices of the products (cf. Article 101(3) TFEU).⁵⁵ Another general objective is maintaining and increasing the coherence of the EU framework.⁵⁶

The above-mentioned provisions illustrate the fact that the EU functions in accordance with the principle of an open market economy. There are, however, some uncertainties regarding what the main objectives actually imply. Are a highly competitive market economy and social market economy compatible goals? The basis

⁵² Commissioner Neelie Kroes, SPEECH/08/521, In defence of competition policy, Opening remarks at the conference “Competition Policy, Growth and Consumer Purchasing Power” on 13 October 2008 in Brussels.

⁵³ Treaty on European Union (2016) (TEU) OJ C202/13, art. 3(3).

⁵⁴ See TFEU, supra note 23, art. 120.

⁵⁵ Sauter, Wolf, *Coherence in EU Competition Law*, (Oxford: Oxford University Press, 2016), p. 65-67; See also definition of Consumer Welfare in supra note 4.

⁵⁶ *Ibid.*, p. 63-64.

for a market economy rests *inter alia* on freedom of choice, contractual freedom and a high level of competition.⁵⁷ EU Competition law is to be interpreted and applied in view of the main objectives in accordance with the teleological interpretation. There will, however, undoubtedly be instances where two or more main objectives will collide with each other. Contractual freedom will have the direct consequence of limiting competition through anti-competitive agreements. Which objective will have precedence over the other in a teleological interpretation? These are relevant issues that need to be highlighted for the purpose of understanding the complexities of actually applying the teleological interpretation, especially on a highly politicized treaty text.

EU Competition law aims to protect the market as a whole and competition as such by prohibiting anti-competitive agreements.⁵⁸ A teleological interpretation will therefore need to consider the functionality of the market and the competition therein. The questions that subsequently arise are if vertical agreements in the form of selective distribution networks are considered to be anti-competitive and consequently whether these arrangements are prohibited under EU Competition law.

4.1.2 Article 101(1) TFEU

Applicability

General

Article 101(1) TFEU prohibits “*all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their **object** or **effect** the prevention, restriction or distortion of competition within the internal market*” (bolded here).⁵⁹

The applicability of the article demands the conclusion of an agreement. This requires the involvement of a minimum of two independent undertakings. The concept of undertakings in EU competition law “*encompasses every entity engaged in an*

⁵⁷ Bernitz, Ulf, *Svensk och europeisk marknadsrätt 1 – Konkurrensrätten och marknadsekonomins rättsliga grundvalar*, (Stockholm: Nordstedts Juridik, 5th edition, 2019), p. 26.

⁵⁸ CJEU: 4 June 2009, C-8/08, T-Mobile Netherlands and Others (2009) ECLI:EU:C:2009:343, para. 38; See also CJEU: 6 October 2009, C-501/06, GlaxoSmithKline Services and Others v Commission and Others (2009) (GlaxoSmithKline) ECLI:EU:C:2009:610, para. 63.

⁵⁹ See TFEU, *supra* note 23, Art. 101(1).

economic activity, regardless of the legal status of the entity and the way in which it is financed.”⁶⁰ An entity is thus not defined by virtue of association law in national legislation. Emphasis is laid upon the economic reality (e.g., supply of goods) and not the legal form.⁶¹

The CJEU has in the joint cases *Consten and Grundig* explained that Article 101 TFEU covers both vertical agreements and horizontal agreements.⁶² It consequently applies to selective distribution networks between a supplier and a distributor.⁶³ The scope of the agreement-concept is in itself broad within the EU encapsulating any ‘concurrence of wills’.⁶⁴

It is sufficient that the vertical agreement may affect trade between Member States. The notion of ‘may affect trade’ means “*it must be possible to foresee with a sufficient degree of probability and on the basis of objective factors of law or fact that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States.*”⁶⁵

The definition of ‘restriction of competition’ remains incomplete. Instead it is established in a case-by-case basis.⁶⁶ Article 101(1) TFEU distinguishes between two types of restrictions of competition: by object or by effect.

Object-Type Restrictions

Object-type restrictions have the intrinsic potential to restrict competition based on the nature of the agreement and empirical evidence.⁶⁷ Examples of agreements that by object restrict competition are price fixing, resale price maintenance and market

⁶⁰ CJEU: 23 April 1991, C-41/90, *Klaus Höfner and Fritz Elser v. Macrotron GmbH*, ECLI:EU:C:1991:161 (*Höfner and Elser*), para. 21.

⁶¹ Ugirashebuja, Emmanuel et al., *East African Community Law – Institutional, Substantive and Comparative EU Aspects*, (Leyden: Brill, 2017), p. 455-456; See also Wijckmans, supra note 26, p. 67.

⁶² CJEU: 13 July 1966, C-56/64 and C-58/64, *Établissements Consten and Grundig-Verkaufs-GmbH v Commission* (1966) (*Consten and Grundig*), ECLI:EU:C:1966:41, p. 339.

⁶³ See Wijckmans, supra note 26, p. 3.

⁶⁴ See Ugirashebuja, supra note 61, p. 456; See also Wijckmans, supra note 26, p. 70 et seq.

⁶⁵ CJEU: 29 April 2004, C-359/01 P, *British Sugar v Commission* (2004) (*British Sugar*), ECLI:EU:C:2004:255, para. 27.

⁶⁶ See Ugirashebuja, supra note 61, p. 457.

⁶⁷ CJEU: 20 November 2008, C-209/07, *Competition Authority v. Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd* (2008) (*Beef Industry*), ECLI:EU:C:2008:643, para. 17.

partitioning. These particular agreements are by virtue of their nature easy to identify as restrictive of competition whereby they are explicitly listed in Article 101(1) TFEU.⁶⁸ An identified object-type restriction is always prohibited under the provision. There is no need to conduct a further analysis of the concrete effects on the market.⁶⁹

The object-category is however open-ended, based on “*any behaviour whose goal is to affect the interests of competitors or of consumers, or the structure of the market and, in so doing, competition as such.*”⁷⁰ It is therefore vital to conduct a preliminary effects analysis on agreements that do not appear on the fixed list in Article 101(1) TFEU.⁷¹ In this regard it is worth pinpointing the fact that the consumer-concept is far-reaching in EU Competition law. It also comprises companies, other than the direct suppliers of goods.⁷²

The assessment of what constitutes as object-type restrictions is based on factors such as “*the content of the agreement and the objective aims pursued by it. It may also be necessary to consider the context in which it is (to be) applied and the actual conduct and behaviour of the parties on the market.*”⁷³ Additionally, the CJEU takes into consideration “*the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question.*”⁷⁴ Essentially the assessment concerns *prima facie* the facts that underlie the purported restrictive behaviour in the agreement.⁷⁵

In principle agreements’ classification as object-type restrictions can be identified either by the anti-competitive nature of the agreement (i.e., no assessment needed) or by a preliminary effects analysis of its anti-competitiveness (i.e., in need of an assessment). If the agreement restricts competition by object a presumption arises of

⁶⁸ See Materljan, *supra* note 9, p. 835.

⁶⁹ Commission Notice on Guidelines on the Application of Article 81(3) of the Treaty (2004) (Guidelines on Article 81(3)) OJ C 101/97, para. 21; See also Van Cleynenbreugel, Pieter, “Article 101 TFEU and the EU Courts: Adapting Legal Form to the Realities of Modernization?”, 51 *Common Market Law Review* 5 (2014), 1381-1436, p. 1411.

⁷⁰ See Van Cleynenbreugel, *supra* note 69, p. 1412.

⁷¹ Nagy, Csongor István, “The Distinction between Anti-competitive Object and Effect after Allianz: The End of Coherence in Competition Analysis?”, 36 *World Competition* 4 (2013), 541-564, p. 542.

⁷² Akman, Pinar, “‘Consumer’ versus ‘Customer’: The Devil in the Detail”, 37 *Journal of Law and Society* 2 (2010), 315-344, p. 315.

⁷³ See Guidelines on Article 81(3), *supra* note 69, para. 22.

⁷⁴ CJEU: 14 March 2013, C-32/11, Allianz Hungária Biztosító Zrt. And Others v. Gazdasági Versenyhivatal (2013) (Allianz), ECLI:EU:C:2013:160, para. 36.

⁷⁵ See Van Cleynenbreugel, *supra* note 69, p. 1416.

its appreciable effects on competition. The assessment ends here without needing to comprehensively examine the actual effects on the market.⁷⁶

Effect-Type Restrictions

It will always be compulsory to demonstrate the concrete effects on the market in order to conclude whether an agreement appreciably restricts competition by effect.⁷⁷

It is the European Commission that has the burden of proof to demonstrate that competition was negatively affected by the particular agreement.⁷⁸ In situations where the effects are yet to materialize considerations are focused primarily, but not exclusively, on the market power and market structure. The probability of negative market effects materializing because of the restrictive agreement are closely linked to these two factors.⁷⁹

The assessment of effect-type restrictions consists of two stages:

1. Determination of the relevant market(s) affected by the agreement. The assessment of effect-type restrictions requires comparing the situation of competition before and after the agreement affected the relevant market.⁸⁰
2. Examination of actual or potential anti-competitive effects of the agreement in the relevant market(s). The extent of actual or potential anti-competitive effects needs to be appreciable in order for an agreement to be prohibited. This is the case if the negative effects can be expected with a reasonable degree of probability.⁸¹

EU Competition law will not be applicable for vertical agreements that do not appreciably affect trade between Member States. Restrictions by object are presumed to appreciably affect trade between Member States, whereas it must be proven for effect-type restrictions.⁸²

⁷⁶ Ibid., p. 1419.

⁷⁷ See Guidelines on Article 81(3), supra note 69, para. 24.

⁷⁸ See Ugrashebuja, supra note 61, p. 457 et seq.

⁷⁹ See Nagy, supra note 71, p. 559.

⁸⁰ See Van Cleynenbreugel, supra note 69, p. 1423-1424.

⁸¹ Ibid.

⁸² See Wijckmans, supra note 26, p. 40-42.

Objective Justification

Selective distribution networks that would otherwise be prohibited under Article 101(1) TFEU and *ex facie* void under Article 101(2) TFEU can be objectively justified. It can only be established through an in-depth analysis of the agreement in a case-by-case basis if it can be objectively justified. This will be further developed in Chapter 4.2.

4.1.3 Block Exemptions in the VBER

A selective distribution network that restricts competition by object or effect and is not objectively justified can still benefit from a block exemption provided in the EU regulation the VBER.⁸³

The basic idea with the VBER is that certain vertical agreements may have efficiency-enhancing effects and that these agreements should be exempted from the general prohibition in 101(1) TFEU.⁸⁴ However, it is also acknowledged that these effects will never outweigh any anti-competitive effects if the market shares of the parties exceed 30 % in the relevant market. Only agreements between suppliers and distributors that have less than 30 % of the market shares each in the relevant market can be presumed to be in compliance with Article 101(3) TFEU and benefit from a block exemption in the regulation. It must be assumed with sufficient certainty that the vertical agreement will satisfy the conditions in Article 101(3) TFEU.⁸⁵ The applicability of the VBER is therefore directly correlated with Article 101(3) TFEU.

Selective distribution networks are defined in the VBER as distribution systems wherein the suppliers impose specified criteria on authorized distributors not to market the goods to unauthorized distributors within the contracted territory.⁸⁶ A selective distribution network is therefore defined in a general way in the VBER. This differs from how it is defined in the Commission's Guidelines on Vertical Restraints. The guidelines make a clear distinction between selective distribution networks that are qualitative *vis-à-vis* quantitative in their nature. This distinction is redundant in

⁸³ See VBER, *supra* note 24.

⁸⁴ *Ibid.*, Preamble para. 6 & Art. 2(1).

⁸⁵ *Ibid.*, Preamble para. 5, 7-9 & Art. 3(1).

⁸⁶ *Ibid.*, Art. 1(e).

respect to the applicability of the VBER. Both qualitative and quantitative selective distribution networks could be exempted by a block exemption through the regulation.⁸⁷

Both the Commission and the National Competition Authority (NCA) can withdraw a benefit from the VBER, at a later stage, if the selective distribution network has appreciable anti-competitive effects that are incompatible with the conditions stipulated in Article 101(3) TFEU.⁸⁸

If the market power does not exceed 30 % it is generally presumed that the agreement will satisfy the criteria in Article 101(3) TFEU.⁸⁹ This general presumption is not without exceptions. If a selective distribution network contains a hard-core restriction it is reversibly presumed not to satisfy the criteria in Article 101(3) TFEU. Such a network will not be granted a block exemption irrespective of the parties' compliance with the threshold of less than 30 % of the market shares.⁹⁰ A selective distribution network contains hard-core restrictions if it:

1. Restricts directly or indirectly distributors from selling the goods to a certain customer group or in a certain territory. This does not apply if it restricts active sales in a territory that is contractually exclusive for the supplier or another distributor. It is also allowed for a supplier to restrict a certain customer group if the presumable buyer is an unauthorized distributor.^{91 92}
2. It restricts authorized distributors in retail from making active or passive sales to end-users.⁹³
 - The Commission has interpreted active sales as sales where the distributor actively approaches individual consumers or a certain consumer group via *inter alia* unsolicited e-mails or advertisement on the Internet.⁹⁴

⁸⁷ See Guidelines on Vertical Restraints, supra note 7, para. 174-176; See also Vogel, Louis, "Efficiency versus Regulation: The Application of EU Competition Law to Distribution Agreements". 4 *Journal of European Competition Law & Practice* 3 (2013), 277-284, p. 280.

⁸⁸ See VBER, supra note 24, preamble para. 13-14.

⁸⁹ Ibid., preamble para. 5 & 8.

⁹⁰ See Guidelines on Vertical Restraints, supra note 7, para. 47.

⁹¹ Ibid., para. 50.

⁹² See VBER, supra note 24, Art. 4(b)(i-iii).

⁹³ Ibid., Art. 4(c).

⁹⁴ See Guidelines on Vertical Restraints, supra note 7, para. 51.

- A passive sale on the other hand is defined as “*responding to unsolicited requests from individual customers including delivery of goods or services to such customers. General advertising (...) that reaches customers in other distributors’ (exclusive) territories or customer groups but which is a reasonable way to reach customers outside those territories or customer groups.*”⁹⁵ If an authorized distributor operates a website for the distribution of the contracted goods, sales through that channel would be considered as passive sales even if it reaches territories and consumer groups outside the exclusive territory.⁹⁶

The Commission has in general considered the hard-core restrictions in the VBER as object-type restrictions within the meaning of Article 101(1) TFEU.⁹⁷ However, the same rationale behind this consideration does not apply vice versa. Object-type restrictions do not automatically qualify as hard-core restrictions. The difference is slight but of great practical importance for the applicability of the VBER.

A supplier can lawfully require distributors to have brick-and-mortar stores as selection criteria for admission to the selective distribution network, according to the Commission.⁹⁸ A supplier can thus exclude strictly online-based distributors (e.g., the German fashion company Zalando) from its network. However, if a supplier only sells its products through brick-and-mortar stores can it, with the same rationale, require the authorized distributors to distribute the goods solely in brick-and-mortar stores? In practice this would constitute an absolute ban of online distribution. Online distribution is according to the Commission a form of passive sales (i.e., consumers reach the distributor’s goods through a website) (cf. Article 4(c) VBER).⁹⁹ An absolute prohibition of online distribution or a *de facto* effect of this sort would thus theoretically, according to the Commission, be considered a hard-core restriction. The same assertion applies irrespective of the nature of the goods as luxury goods.¹⁰⁰

⁹⁵ Ibid.

⁹⁶ Robertson, H.S.E., Viktoria, “Online sales under the European Commission’s Block Exemption Regulation on vertical agreements: Part 2”, 33 *European Competition Law Review* 4 (2012), 179-184, p. 181.

⁹⁷ See Guidelines on Article 81(3), supra note 69, para. 23.

⁹⁸ See Guidelines on Vertical Restraints, supra note 7, para. 54.

⁹⁹ Ibid., para. 52.

¹⁰⁰ Colangelo, Giuseppe & Torti, Valerio, “Selective distribution and online marketplace restrictions under EU competition rules after Coty Prestige”, 14 *European Competition Journal* 1 (2018), 81-109, p. 88.

However, whether the CJEU shares the Commission's viewpoint is a whole other issue.

4.1.4 Individual Assessment in Article 101(3) TFEU

The overall objectives of EU Competition law are to enhance consumer welfare by protecting competition. However, anti-competitive agreements may simultaneously enhance consumer welfare. Vertical agreements may have efficiency-enhancing effects leading to *inter alia* product quality enhancement and reduction of production costs resulting in a lowering of product pricing for consumers.¹⁰¹

Article 101(3) TFEU provides with an exemption to the prohibition in Article 101(1) TFEU.¹⁰² Anti-competitive agreements are always exempted when the following four cumulative criteria are fulfilled:

1. The agreement, decision or concerted practice shall contribute “*to improving the production or distribution of goods or to promoting technical or economic progress.*”¹⁰³
2. A fair share of the resulting benefits of the agreement shall be passed on to the consumers.
3. Imposed restrictions on undertakings shall be indispensable with the attainment of the objectives in 1.
4. It shall not give the undertakings “*the possibility of eliminating competition in respect of a substantial part of the products in question.*”¹⁰⁴

It is possible to assess the fulfilment of the four criteria in a different order. The main objectives and aim of EU law may be taken into account, provided that they can be subsumed by the criteria in Article 101(3) TFEU. Once the four cumulative criteria are fulfilled the agreement is exempted. However, the exemption also ceases to apply when the criteria are no longer fulfilled (e.g., alteration of the circumstances).¹⁰⁵

¹⁰¹ See Guidelines on Article 81(3), supra note 69, para. 33.

¹⁰² Council Regulation EC/1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Article 81 and 82 of the Treaty, Art. 1(2).

¹⁰³ See TFEU, supra note 23, Art. 101(3).

¹⁰⁴ Ibid.

¹⁰⁵ See Guidelines on Article 81(3), supra note 69, para. 38, 42 & 44.

The first criterion aims to concretize the efficiency-enhancing effects that can be taken into account when assessing the fulfilment of the second and third criterion. There must be a direct causality between the anti-competitive agreement and the claimed efficiencies. In other words if the agreement had not been concluded the efficiencies of *a*, *b* and *c* would not have materialized.¹⁰⁶ It is therefore necessary that all efficiency claims are substantiated in order to verify their nature, likelihood, magnitude, how and when they are to be achieved and the correlation between the agreement and the claimed efficiencies.¹⁰⁷

The concept of ‘fair share’, in the second criterion, means that the consumers should be compensated for the possible negative effects materializing because of the agreement. This consequently means that the more anti-competitive effects produced by an agreement the greater the fair share of the resulting benefits for the consumers. If the affected consumers are worse off with the agreement than without it the second criterion is not fulfilled. The overall impact on the consumers is the decisive factor.¹⁰⁸ It is essential that the assessment be made within the confines of the relevant market. Positive effects for consumers in one relevant market are rarely extended to consumers in other markets, provided that the affected groups of consumers are not substantially the same.¹⁰⁹

If there are other less restrictive but nonetheless realistic alternatives of producing the claimed efficiencies the agreement is not deemed necessary.¹¹⁰ If the agreement is deemed necessary to achieve the efficiencies, it must also be assessed whether the specific individual restrictions in the agreement are reasonably necessary for this purpose. The Commission has explained “*a restriction is indispensable if its absence would eliminate or significantly reduce the efficiencies that follow from the agreement or make it significantly less likely that they will materialise.*”¹¹¹ It is unlikely that hard-core restrictions listed in the VBER are indispensable.¹¹²

¹⁰⁶ Ibid., para. 50.

¹⁰⁷ Ibid., para. 51-55.

¹⁰⁸ Ibid., para. 85, 87 & 90.

¹⁰⁹ Ibid., para. 43.

¹¹⁰ Ibid., para. 76.

¹¹¹ Ibid., para. 78-79.

¹¹² Ibid., para. 79.

The fourth criterion acknowledges the fact that competition intrinsically produces economic efficiency and is therefore subject to a greater protection. If competition has substantially been eliminated through the restrictive agreement, then the fourth criterion will not be fulfilled. Eliminating competition “*depends on the degree of competition existing prior to the agreement and on the impact of the restrictive agreement on competition.*”¹¹³ The analysis in this respect is both qualitative and quantitative taking into account other factors than market shares (e.g., the incentives and capacity of competitors to actually compete). If actual competitors are unable or limited to compete due to capacity constraints (i.e., not related to the restrictive agreement) the quantifiable impact on competition by the agreement will be smaller. It is also possible to consider potential competition in the context of the fourth condition. For this purpose it is relevant to analyse the barriers to entry for undertakings not currently competing in the relevant market, such as the cost of entry.¹¹⁴

It is solely up to the undertakings themselves to prove that the four cumulative criteria have been fulfilled, as they will have the burden of proof.¹¹⁵

The legal status of selective distribution networks can consequently be divided into three connected assessments:

1. If a selective distribution network restricts competition it can still be allowed under Article 101(1) TFEU if it is objectively justified (see Chapter 4.2.1).
2. However, in spite of the absence of an objective justification a selective distribution network can benefit from a block exemption in the VBER. The applicability of such a block exemption requires that the market shares of the supplier and distributor are under the threshold of 30 % each in the relevant market, the vertical agreement is not considered a hard-core restriction and that it is assumed with sufficient certainty that the agreement will satisfy the conditions in Article 101(3) TFEU. A block exemption will be withdrawn for a selective distribution network or a certain clause in the network that,¹¹⁶

¹¹³ Ibid., para. 107.

¹¹⁴ Ibid., para. 109, 114 & 115(ii).

¹¹⁵ Ibid., para. 41; CJEU: 7 February 2013, C-68/12, Protimonopolný úrad Slovenskej republiky v. Slovenská sporiteľňa a.s. (2013) (Protimonopolný), ECLI:EU:C:2013:71, para. 36.

¹¹⁶ See Wijckmans, supra note 26, p. 267.

prima facie, satisfy all the conditions but has *ex post* effects that is not in conformity with the conditions in Article 101(3) TFEU.

3. It will be necessary to conduct an individual assessment under Article 101(3) TFEU, where the four cumulative criteria, discussed in the above paragraphs, need to be fulfilled. This will be done for selective distribution networks that are not objectively justified under Article 101(1) TFEU, not exempted by a block exemption in the regulation or where there is uncertainty whether the network is in conformity with Article 101(3) TFEU.

4.2 CJEU Case Law

The CJEU has jurisdiction to give preliminary rulings concerning questions on the interpretation of treaties and other acts issued by EU institutions.¹¹⁷ In this section, relevant case law from the CJEU will be analysed including judgements by the General Court.

4.2.1 *Metro I*¹¹⁸ & *II*¹¹⁹

Background & Judgement

The dispute in *Metro I* revolved around the manufacturer of electronics SABA and the wholesaler Metro. SABA had a selective distribution network. Metro was not granted admission in the network because of the selection criteria only allowing certain specialist dealers as authorized distributors. Metro argued that the selective distribution network reduced intra-brand competition and thereby restricted price competition. Non-specialist dealers might have had offered better prices for the products. SABA maintained that the restriction ensured that consumers would receive professional technical advice for SABA's high-end consumer electronics.¹²⁰

¹¹⁷ See TFEU, *supra* note 23, Art. 267.

¹¹⁸ CJEU: 25 October 1977, C-26/76, *Metro SB - Großmärkte GmbH & Co. KG v. Commission* (1977) (*Metro I*), ECLI:EU:C:1977:167.

¹¹⁹ CJEU: 22 October 1986, C-75/84, *Metro SB-Großmärkte GmbH & Co. KG v. Commission* (1986), (*Metro II*), ECLI:EU:C:1986:399.

¹²⁰ See *Metro I*, *supra* note 118, p. 1899, para. 7 & 8; See also Witt, Anne C, "Restrictions on the use of third-party platforms in selective distribution agreements for luxury goods", 12 *European Competition Journal* 2/3 (2016), 435-461, p. 440.

The CJEU concluded that selective distribution networks could be imposed in regard to other legitimate objectives of maintaining a feasible competition, related to other factors than price competition.¹²¹ As a supplement to this conclusion the CJEU established three cumulative criteria that need to be fulfilled in order for a selective distribution network to be compatible with Article 101(1) TFEU.¹²²

1. The goods necessitate setting up a selective distribution network in relation to their particular characteristics (i.e., to maintain their proper use or their proper quality).¹²³
2. The distributors “*are chosen on the basis of objective criteria of a qualitative nature relating to the technical qualifications of the reseller and his staff and the suitability of his trading premises and that such conditions are laid down uniformly for all potential resellers and are not applied in a discriminatory manner.*”¹²⁴
3. The selective distribution network is not subject to conditions that go beyond what is necessary.¹²⁵

The CJEU validated these three criteria in Metro II and complemented with an additional fourth criterion.

4. The number of similar selective distribution networks leaves room for “*other forms of distribution based on a different type of competition policy or results in a rigidity in price structure which is not counterbalanced by other aspects of competition between products of the same brand and by the existence of effective competition between different brands.*”¹²⁶

Due to its circumstantial specificity the fourth criterion is not as much applied in the CJEU case law as the other three criteria. It will therefore not be discussed as much.

¹²¹ Ibid., p. 1904-1905, para. 21.

¹²² Ibid., p. 1904-1905, para. 20-21; See also Witt, supra note 120, p. 440-441.

¹²³ Ibid.

¹²⁴ Ibid., p. 1904, para. 20.

¹²⁵ See Witt, supra note 120, p. 441.

¹²⁶ See Metro II, supra note 119, para. 40; See also Witt, supra note 120, p. 441.

Remarks on Metro I & II

The Metro-test enables a supplier to set up a selective distribution network if it fulfils four cumulative criteria. The Commission has issued guidelines on how these criteria are supposed to be interpreted. The guidelines are non-binding but nevertheless authoritative. The CJEU has therefore a margin of appreciation to decide whether it shall take the approach of the Commission into account in its judgement.

The first criterion relates to the necessity of setting up a selective distribution network in order to preserve the proper quality or the proper use of the goods concerned. The nature of the product is consequently relevant in regard to the first criterion. There is no fixed list of the products that requires setting up such a network. The Commission elaborates in Guidelines on Vertical Restraints “*the case is strongest for new products, for complex products, for products of which the qualities are difficult to judge before consumption (so-called experience products) or of which the qualities are difficult to judge even after consumption (so-called credence products).*”¹²⁷ As long as the selective distribution network has been set up in order to fulfil a legitimate objective, relating to the nature of the product and to preserve the proper quality or use of the goods, the system will satisfy the first criterion.¹²⁸ The Commission exemplifies solving free-rider problems or maintaining brand image as relevant instances where the nature of the goods is vital.¹²⁹ The significance of maintaining brand image is notable for suppliers of luxury goods (see Chapter 3). Selective distribution networks for luxury goods will thus have easier of fulfilling the first criterion if the CJEU were to take the same approach as the Commission in the guidelines.

The second criterion precludes quantitative selective distribution networks (i.e., networks that quantitatively limit the number of resellers).¹³⁰ In the assessment of whether selective distribution networks are anti-competitive it is thus relevant to distinguish between quantitative and qualitative selective distribution networks. The latter could possibly be allowed, while the former is indirectly considered anti-competitive under Article 101(1) TFEU on the basis of the Metro-test.

¹²⁷ See Guidelines on Vertical Restraints, *supra* note 7, para. 185.

¹²⁸ *Ibid.*, para. 175.

¹²⁹ *Ibid.*, para. 185.

¹³⁰ *Ibid.*, para. 175.

A selective distribution network shall be set up in accordance with the principle of proportionality in the third criterion. In the case Vichy the General Court explained, “*the distribution network for Vichy products, is certainly not necessary for the proper distribution of those products. (...) such a criterion is entirely unnecessary for the proper distribution of the products in question and is as a result disproportionate.*”¹³¹

The Metro-test balances produced pro-competitive effects with the anti-competitive effects inherent in a selective distribution network in a case-by-case analysis. This is done within the confines of Article 101(1) TFEU, instead of assessing it within the individual assessment provided in Article 101(3) TFEU. The Metro-test is therefore an elaboration of the objective justification analysis. If selection criteria are quantitative in its nature it is presumed that the network restricts competition. Contrariwise, it might still be allowed under Article 101(3) TFEU. The pivotal difference between the objective justification analysis within Article 101(1) TFEU and the individual assessment under Article 101(3) TFEU lies therefore in the fact that the former is formalistic and presumption-driven while the latter is more pragmatic capturing the specificities of the actual effects in the relevant market (cf. *ex ante* and *ex post*).¹³²

4.2.2 *Leclerc I*¹³³ & *II*¹³⁴

Background & Judgement

The producer of perfumes, Yves Saint Laurent, had a selective distribution network. The selection criteria were related to the “*professional qualifications of staff, the location (...) and cooperation on advertising and promotion between the retailer and Yves Saint Laurent.*”¹³⁵ The Groupement d’achat Édouard Leclerc (Leclerc) was denied entry into the network, as it did not meet these criteria.

¹³¹ CJEU: 27 February 1992, C-T-19/91, Société d’Hygiène Dermatologique de Vichy v. Commission (1992) (Vichy), ECLI:EU:T:1992:28, para. 69.

¹³² See Witt, supra note 120, p. 441-442.

¹³³ CJEU: 12 December 1996, C-T-19/92, Groupement d’achat Édouard Leclerc v. Commission (1996) (Leclerc I), ECLI:EU:T:1996:190.

¹³⁴ CJEU: 12 December 1996, C-T-88/92, Groupement d’achat Édouard Leclerc v. Commission (1996) (Leclerc II), ECLI:EU:T:1996:192.

¹³⁵ See Leclerc I, supra note 133, para. 10.

The General Court initially concluded that selective distribution networks should fulfil the criteria in the Metro-test in order for them to be in conformity with EU Competition law.¹³⁶ The Metro-test was introduced by the CJEU to allow competitive restrictions regarding “*high quality and technically advanced consumer durables*,”¹³⁷ because “*Such products may indeed require a sales service and after-sales service specially adapted to their characteristics and linked to their distribution.*”¹³⁸ The Metro-test has since its introduction been applied in numerous different cases involving dissimilar categories of products (e.g., watches, newspapers, computers).¹³⁹ The General Court confirmed accordingly that selective distribution networks could be justified in respect to other product sectors than initially established in the Metro cases.¹⁴⁰

It was argued by the Court that luxury goods, specifically luxury cosmetics and luxury perfumes, are high-quality products and that these sophisticated luxury goods have a distinctive luxury image. This luxury image is directly interconnected to, not only the material characteristics of the products, but also to the consumer’s distinctive perception of those products as luxury goods. The consumer’s distinctive perception of those products has arisen from their very nature.¹⁴¹ Consumers have thus a concrete interest that luxury products are presented appropriately in retail outlets for the preservation of the luxury image. It was therefore established by the Court that selective distribution networks seeking to preserve the aura of luxury of the goods have a legitimate objective and will be in conformity with EU Competition law if the other two criteria of the Metro-test are also fulfilled.¹⁴²

Remarks on Leclerc I & II

The General Court establishes that the consumers have a direct interest that luxury goods are treated in accordance with their luxury image and thereby acknowledges the value that consumers receive of it. A selective distribution network seeking to preserve the luxury image will therefore always have a legitimate aim to set up such a

¹³⁶ See *Leclerc II*, supra note 134, para. 3.

¹³⁷ See *Metro I*, supra note 118, p. 1904, para. 20.

¹³⁸ See *Metro II*, supra note 119, para. 54.

¹³⁹ Grasso, Roberto & Tzifa, Georgia, “The ECJ Ruling In *Coty* and the Future of Vertical Restrictions in the Internet Space”, 41 *World Competition* 3 (2018), 367-394, p. 371.

¹⁴⁰ See *Leclerc II*, supra note 134, para. 3.

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*

network because of Leclerc I & II. The first criterion of the Metro-test will thus always be fulfilled. This conclusion is in line with what was presented and established in Chapter 3 about the luxury-concept. In the context of Chapter 3 the value that consumers receive (e.g., status and social recognition) is a part of the consumer welfare in EU Competition law. An increase of consumer welfare is desirable within the EU (see main objectives in Chapter 4.1). The Court's reasoning of extending the Metro-test to luxury products is accordingly in conformity with EU Competition law.

The General Court's judgement is thus in accordance with the theories presented in Chapter 3 of this thesis. However, the Court's reasoning regarding the luxury-concept is vague and hard to grasp. The Court explains that the *“luxury perfumes, are sophisticated and high-quality products with a distinctive ‘luxury image’ which is important in the eyes of consumers. The characteristics of those products cannot be limited to their material characteristics but also encompass the specific perception that consumers have of them, in particular their ‘luxury image’, which thus arises from their very nature.”*¹⁴³ The Court does not elaborate further on this. Based on a textual interpretation the reasoning can be interpreted in two ways:

1. The General Court argues that the luxury image has arisen from the luxury products' very nature as luxury perfumes and luxury cosmetics.
2. The General Court argues that the luxury image has arisen from the luxury products' very nature as high-quality and sophisticated goods.

The former interpretation of the statement seems to be a circular reasoning of how the luxury image is created. This would however reflect the dynamics and complexities of the luxury-concept. The latter interpretation is an overly simplification of the luxury-concept. There are numerous other characteristics and components that affect the perception of the consumers other than the actual material quality or sophistication of those goods (see Chapter 3). It is thus uncertain whether the Court always considers cosmetics and perfumes as luxury goods, or just luxury cosmetics and luxury perfumes. Because of the General Court's vagueness it is dubious if one can derive any well-reasoned and comprehensible conclusions on the luxury-concept at all. The

¹⁴³ Ibid.

interpretation of the Court's statements on this matter will therefore be left unresolved.

4.2.3 Copad Dior¹⁴⁴

The legal context of the case is based on European IP law. The Court discusses if a contravention of the specific provisions of the license agreement in relation to the circumstances of the case affects the aura of luxury. The CJEU generously discusses the luxury-concept in this regard. The judgement is therefore relevant for the legal understanding of the luxury-concept. As the subject matter of the thesis is correlated to the implicit certainty that luxury goods are bearers of trademarks, the Court's reasoning is also applicable for the CJEU case law dealing with subject matters of EU Competition law.

Background & Judgement

Dior concluded a license agreement with SIL regarding *inter alia* the distribution of Dior's luxury goods. In order to maintain Dior's repute and prestige a selective distribution network had been set up. SIL agreed not to sell the luxury goods to particular market participants (e.g., wholesalers, discount stores, mail order companies). In defiance of this agreement SIL sold the goods to Copad that operated a discount store. Dior brought an appeal against SIL and Copad for trademark infringement.¹⁴⁵

A supplier can lean on the conferred rights from a luxury trademark when a licensee contravenes specific provisions in a selective distribution network for prestigious goods.¹⁴⁶ However, it first has to be established that a contravention damages "*the allure and prestigious image which bestows on those goods an aura of luxury.*"¹⁴⁷ As the aura of luxury on high-quality goods enables consumers to distinguish those goods from other common goods "*impairment to that aura of luxury is likely to affect the actual quality of those goods.*"¹⁴⁸

¹⁴⁴ CJEU: 23 April 2009, C-59/08, Copad SA v. Christian Dior couture SA, Vincent Gladel and Société industrielle lingerie (SIL) (2009) (Copad Dior), ECLI:EU:C:2009:260.

¹⁴⁵ Ibid., para. 7-11.

¹⁴⁶ Ibid., para. 23.

¹⁴⁷ Ibid., para. 37.

¹⁴⁸ Ibid., para. 25-26.

The Court pointed out that a selective distribution network can, in general terms, be a safeguard for the preservation of luxury goods' proper quality and proper use. It is acknowledged that a contravention of a selective distribution network by selling the luxury goods to third parties may negatively affect the aura of luxury and therefore the interconnected quality of those goods. It is the national courts that have to determine whether a contravention of a license agreement may damage the aura of luxury.¹⁴⁹

Remarks on Copad Dior

According to the judgement of the Court if you are a supplier of luxury goods you are incentivized to protect the aura of luxury of these goods. If you are selling the items outside the distribution chain, there is a higher probability of damaging the aura of luxury. Luxury goods have thus an extra layer of protection through the aura of luxury. The question that arises is how can you determine what is luxury?

It is up for each national court to decide whether a product is luxury or not. There is no established legal definition on this matter.¹⁵⁰ However, the CJEU gives some form of guidance regarding the luxury-concept.

It is acknowledged that the aura of luxury enables consumers to distinguish those goods from other common goods and that impairing the aura of luxury will likely affect the actual quality of those goods. The CJEU explicitly reasons on the concept of luxury within the parameters of high-quality goods. Based on this fact, it is always presumed that luxury goods are high-quality goods with a connected luxury image that automatically increases the already high quality of those goods. As the aura of luxury is an integral component of the actual quality of luxury goods, a tarnished image will accordingly also affect the quality and value of the goods. This will in turn be detrimental for the consumer welfare, as the aura of luxury stems directly from the consumer's distinctive perception of the goods as luxury goods.

The judgements of the CJEU in Copad Dior and Leclerc I-II are so far in accordance with the theories presented in Chapter 3. The quality of luxury goods is determined by

¹⁴⁹ Ibid., para. 28-31.

¹⁵⁰ See Grasso, supra note 139, p. 390.

both the material aesthetics and the distinctive perception of the consumers. This is defined by the CJEU as the aura of luxury. However, it is still left ambiguous how a product obtains an aura of luxury. Is it possible that the conclusions made by the CJEU in Copad Dior and Leclerc I-II is the result of an implicit research of the luxury-concept within the parameters described in Chapter 3? This prospect shall not be precluded. The conclusions of the Court are in conformity with the theories presented in Chapter 3, albeit with different terminology.

4.2.4 *Pierre Fabre* ¹⁵¹

Background & Judgement

Pierre Fabre manufactured and sold cosmetics and personal care products. These products were sold through pharmacists, however they were not considered as medicines. Pierre Fabre's market shares in the French market for those products were 20 %. Pierre Fabre had set up a selective distribution network that provisioned that stipulated products should be sold exclusively in a physical space with the presence of a qualified pharmacist. This entailed an exclusion of online distribution for those products. Pierre Fabre argued *inter alia* that such requirements are necessary by virtue of the products' nature in order for the customer to obtain and request individualized advice from a specialist. Pierre Fabre moreover maintained that the brand image of the products needed protection.¹⁵²

The French National Competition Authority (NCA) had settled that Pierre Fabre's selective distribution network amounted to a restriction of competition, without applicable exemptions. Pierre Fabre was forced to remove this restriction in its selective distribution network, therefore bringing an action before the French court for annulment of the decision by the NCA.¹⁵³ The French court referred a question to the CJEU for a preliminary ruling. The CJEU reformulated it to the following questions:

1. Does an absolute ban of online distribution through a selective distribution network qualify as an object-type restriction within Article 101(1) TFEU?

¹⁵¹ CJEU: 13 October 2011, C-439/09, *Pierre Fabre Dermo-Cosmétique SAS v. Président de l'Autorité de la concurrence and Ministre de l'Économie, de l'Industrie et de l'Emploi* (2011) (*Pierre Fabre*), ECLI:EU:C:2011:649.

¹⁵² *Ibid.*, para. 9-14, 17 & 45.

¹⁵³ *Ibid.*, para. 19-27.

2. May such a selective distribution network, falling within the scope of Article 101(1) TFEU, benefit from the block exemption provided in Regulation No 2790/1999 (now VBER)?
3. If the block exemption is inapplicable can the selective distribution network be eligible for the exemption provided under Article 101(3) TFEU?¹⁵⁴

First Question

The CJEU agreed with the referring court and the NCA that the selective distribution network at issue *de facto* prohibited online distribution. By solely allowing the marketing of products necessitating the physical movement of the consumers, the network restricted the distribution of products for potential consumers outside the distributors' contractual territory or area of activity. It was therefore “*liable to restrict competition in that sector.*”¹⁵⁵ Selective distribution networks are therefore considered as agreements that restrict competition by object and are therefore prohibited in the absence of an objective justification.¹⁵⁶

It was recognized by the Court that a selective distribution network pursuing a legitimate goal, relating to other factors than price, is in conformity with Article 101 TFEU if it fulfils the Metro-test. The selective distribution network at issue was qualitative in its nature and not discriminatory. However, what was left to be determined was if the restriction of competition was necessary for pursuing a legitimate aim and was proportionate (read Metro-test criterion 1 & 3).¹⁵⁷

The CJEU disregarded Pierre Fabre's argument of the need to have authorized pharmacists in a physical space. The Court also explained that setting up a selective distribution network in order to maintain a prestigious brand image is not a legitimate aim.¹⁵⁸ The Court therefore settled that the network could not be objectively justified.¹⁵⁹

¹⁵⁴ Ibid., para. 31-33.

¹⁵⁵ Ibid., para. 37-38.

¹⁵⁶ Ibid., para. 39.

¹⁵⁷ Ibid., para. 40-43.

¹⁵⁸ Ibid., para. 44-46.

¹⁵⁹ Ibid., para. 47.

Second & Third Question

The prohibition of online distribution had “*as its object the restriction of passive sales to end users wishing to purchase online and located outside the physical trading area of the relevant member of the selective distribution system.*”¹⁶⁰ It was consequently a hard-core restriction.

The Court did not conduct an individual assessment under Article 101(3) TFEU as it had insufficient information to do so.¹⁶¹

Remarks on Pierre Fabre

The CJEU explicitly clears out any obscurities from previous case law by concluding that selective distribution networks constitute object-type restrictions in the absence of an objective justification.

The CJEU did not acknowledge that maintaining a prestigious image for the products was a legitimate objective. It would unfortunately be inconsistent with previous case law if the judgement of CJEU meant that protecting the luxury image of products is not a legitimate aim within the parameters of the first criterion of the Metro-test. It has been established in both the two Leclerc cases and Copad Dior, in accordance with Chapter 3, that the luxury image of goods does affect the overall quality of luxury goods. A tarnished luxury image of goods is in turn detrimental for the desirable aim of EU Competition law to increase consumer welfare. The judgement of Pierre Fabre would therefore not be in conformity with EU Competition law if it invalidates the principles established in the earlier mentioned cases. The assumption is therefore either that:

1. There is a difference between a prestigious image and a luxury image,
2. The aim to preserve the prestigious image is not a legitimate aim in relation to an absolute prohibition of online distribution, or
3. The ruling of Pierre Fabre is only to be understood in view of the specific context and circumstances.

¹⁶⁰ Ibid., para. 53-54.

¹⁶¹ Ibid., para. 50 & 59.

Overall the CJEU takes the same approach as the Commission in Guidelines on Vertical Restraints. Selling online is a form of passive sales where customers can reach the distributor. An absolute ban of online distribution therefore constitutes a hard-core restriction under Article 4(c) VBER.¹⁶²

4.2.5 Coty Prestige¹⁶³

Background

Coty Germany GmbH was a supplier of luxury cosmetics. Parfümerie Akzente GmbH was an authorized distributor of those goods. Parfümerie distributed the goods both via its brick-and-mortar stores and online through its own exclusive website and through www.amazon.de (i.e., a third-party platform).¹⁶⁴

Coty Prestige had a selective distribution network for its authorized distributors stipulating that *“each of the distributor’s sales locations must be approved by Coty Germany, which implies compliance with a number of requirements, set out in Article 2 of that contract, relating to their environment, décor and furnishing.”*¹⁶⁵ Article 2 in the contract specified *inter alia* that the décor, furnishing and advertising should highlight and promote the luxury character of the goods. The supplemental agreement between the two parties also prohibited the use of *“a different name or to engage a third-party undertaking which has not been authorized.”*¹⁶⁶ Coty Germany revised the contract after the entry into force of the VBER. The revised contract stipulated that the authorized distributors were entitled to market the products online provided it happened in the exclusive electronic shop windows of the authorized distributors and the goods’ luxury character were preserved. Parfümerie Akzente refused to accept the amendments.¹⁶⁷

The case was brought to the CJEU for a preliminary ruling on the following questions:

¹⁶² See Guidelines on Vertical Restraints, *supra* note 7, para. 52-53; See also Pierre Fabre, *supra* note 151, para. 54.

¹⁶³ CJEU: 6 December 2017, C-230/16, Coty Germany GmbH v. Parfümerie Akzente GmbH (2017) (Coty Prestige), ECLI:EU:C:2017:941.

¹⁶⁴ *Ibid.*, para. 9.

¹⁶⁵ *Ibid.*, para. 11.

¹⁶⁶ *Ibid.*, para. 12 & 14.

¹⁶⁷ *Ibid.*, para.15-16.

1. Is a selective distribution network that aims to preserve the luxury image of goods in compliance with Article 101(1) TFEU?
2. Does Article 101(1) TFEU preclude a selective distribution network that prohibits authorized distributors from marketing the luxury goods online in third-party platforms?
3. Can the selective distribution network at issue benefit from a block exemption in the VBER in relation to Article 4(b-c) in that regulation?¹⁶⁸

Judgement

First Question

Selective distribution networks affect competition within the EU, but such a network may nonetheless be in compliance with Article 101(1) TFEU if the criteria in the Metro-test are fulfilled.¹⁶⁹

The Court referred to the judgement in Copad Dior. It was established in Copad Dior that the quality of a product is determined also by its allure and prestigious image “which bestow on them an aura of luxury, that that aura is essential in that it enables consumers to distinguish them from similar goods and, therefore, that an impairment to that aura of luxury is likely to affect the actual quality of those goods.”¹⁷⁰ The Court concluded that a selective distribution network may in fact preserve and ensure the proper quality and use of goods and that the one in Coty Prestige in fact contributed to enhancing and sustaining the goods’ aura of luxury. Such a network can be objectively justified provided that the criteria in the Metro-test are fulfilled.¹⁷¹

The above-mentioned is compatible with the judgement of Pierre Fabre, which according to the CJEU has to be read and understood in light of the specific circumstances of that case. In Pierre Fabre the online sales ban was absolute regarding cosmetics and body hygiene products that were not considered as luxury goods. The

¹⁶⁸ Ibid., para. 20.

¹⁶⁹ Ibid., para. 23-24; See also Wijckmans, Frank, “Coty Germany GmbH v Parfümerie Akzente GmbH: Possibility in Selective Distribution System to Ban Sales via Third-Party Platforms”, 9 *Journal of European Competition Law & Practice* 6 (2018), 373-375, p. 374.

¹⁷⁰ Ibid., para. 25.

¹⁷¹ Ibid., para. 27-29.

CJEU thus clarified that the ruling in *Pierre Fabre* was not to establish a general principle applicable for all types of products.¹⁷²

Second Question

The selective distribution network at issue had the inherent function of preserving the proper quality of the luxury goods (see above paragraph). By prohibiting the authorized distributors from marketing the products through third-party platforms the goods were exclusively associated with the distributors, which is coherent with the specific function and characteristics of a selective distribution network.¹⁷³

The supplier could, through the network, control that the agreed upon qualitative conditions were fulfilled. The lack of contractual relationship between the supplier and third-party platforms prevented the supplier from coercing compliance with the agreed upon qualitative conditions with its authorized distributors. This might have compromised the aura of luxury bestowed on the goods.¹⁷⁴

The appropriateness of the selective distribution network was also supported *ipso facto* that the network did not prohibit the distribution online in its entirety. It only prohibited online sales through discernible third-party platforms. The clause was also necessary due to the lack of contractual relationship between the supplier and third-party platforms to coerce compliance with qualitative conditions. The factor that the majority of the sales in e-commerce are normally done in authorized distributors' own online shops was also important in the proportionality assessment. The network at issue was therefore proportionate for attaining the legitimate objective of preserving the luxury image.¹⁷⁵ It was therefore objectively justified.¹⁷⁶

Third & Fourth Question

Coty Prestige did not exceed the threshold of 30 % of the market shares in the relevant market. The clause in the selective distribution network could therefore have

¹⁷² Ibid., para. 35.

¹⁷³ Ibid., para. 42-46.

¹⁷⁴ Ibid., para. 47-49.

¹⁷⁵ Ibid., para. 44 et seq.

¹⁷⁶ Ibid., para. 58.

been exempted. However, the benefit of the VBER does not apply if the clause qualifies as a hard-core restriction.¹⁷⁷

The Court firstly remarked that the clause at issue did not prohibit all online distribution. It only prohibited distribution through discernible third-party platforms, which was not the only way of reaching customers. The clause even allowed under certain conditions the authorized distributors to use the Internet as a means to advertise the goods. Ultimately it is not possible to “*circumscribe, within the group of online purchasers, third-party platform customers.*”¹⁷⁸ Taking these considerations into account, the Court concluded that the clause at issue did not restrict the distributors’ customers or passive sales of authorized distributors to end users within the meaning of Article 4(b-c) of VBER. It was therefore not a hard-core restriction.¹⁷⁹

Remarks on Coty Prestige

A supplier of luxury goods can justify the implementation of a selective distribution network in order to protect the luxury image. This is a legitimate aim within the first criterion of the Metro-test.

The rare nature of the luxury-concept entails that the protection of the luxury image must seek to preserve the distinctive perception consumers have concerning luxury goods. The most commonly mentioned characteristic of luxury products is exclusivity (see Chapter 3). Luxury goods that are not perceptually considered to be exclusive from the perspective of the consumers will have a deteriorated luxury image. A selective distribution network has the inherent function of limiting the number of authorized distributors based on the fulfilment of particular selection criteria. The subsequent effect of setting up such a network is that it maintains exclusivity for the products and thus effectively preserves their luxury image. This dynamic is in line with the theories presented in Chapter 3, acknowledged by the CJEU in the two Leclerc cases and Copad Dior and reiterated now in Coty Prestige.

The CJEU chose not to define the luxury-concept. The Court’s statements on the concept will thus only extend to situations where it is *de facto* established that the

¹⁷⁷ Ibid., para. 59 & 61.

¹⁷⁸ Ibid., para. 64-66.

¹⁷⁹ Ibid., para. 67-69.

products in question are qualified as luxury products. In all other situations it is indispensable to initially examine if the products have an aura of luxury. It is in the jurisdiction of each single national court and NCA to conduct this examination in a case-by-case basis. The author Roberto Grasso claims that it is inevitable that diverging interpretations of the luxury-concept will materialize between the Member States of the EU.¹⁸⁰ In present times there are global luxury brands (i.e., luxury brands globally considered as such). Even concerning new luxury brands the same components of the luxury-concept apply irrespective of the country of origin. The problem is therefore not related to the lack of uniformity about the understanding of the luxury-concept. It is more related to the fact that the components of the luxury-concept might be valued differently depending on the interests of the Member States in relation to, specifically in this thesis, e-commerce and its value. It will be of interest for the EU to correct the Member States' flexibility with regard to these types of issues. If the EU institutions were to issue legally binding guidance on the luxury-concept the discrepancy of interests will have less of an effect on the coherence of the EU framework.

It is not clear whether the applicability of the ruling could be extended to similar cases wherein the only difference lies in the non-luxury character of the products. The explicit wording of the judgement never excludes this possibility. In theory the prospect still exists. However, in practice non-luxury goods will have difficulties of finding legitimate aims that will be appropriate and necessary in relation to preserving their proper quality or proper use by restricting online distribution. The difficulties for non-luxury goods exist, however, only within the parameters of Article 101(1) TFEU. The VBER applies irrespective of the nature of goods. According to the CJEU, restrictions on the use of third-party platforms are not qualified as hard-core restrictions. This finding applies also for non-luxury goods. However, it still has to, with sufficient certainty, be assumed that the selective distribution networks are in compliance with the individual assessment in Article 101(3) TFEU. Otherwise the NCA or the Commission will surely withdraw the benefit. Will a restriction of online distribution for non-luxury goods generate efficiencies that will outweigh the anti-competitive effects of such a restriction? It is possible, albeit not probable. This will be further analysed in Chapter 5.

¹⁸⁰ See Grasso, *supra* note 139, p. 390.

The CJEU clarifies the uncertainty of the future implications of Pierre Fabre. Coty Prestige does not invalidate the ruling of Pierre Fabre. The case shall be understood in light of its specific facts. The intention of the CJEU in Pierre Fabre was not, according to the Court in Coty Prestige, to establish general principles. The Court's self-prescribed conformity with previous case law is contested among authoritative authors in the field of EU Competition law. The author Bernadette Zelger is, however, of the same view as the CJEU. She thoroughly argues that the context and circumstances of Pierre Fabre led to a judgement that can only be viewed with respect to that specific context and those specific circumstances.¹⁸¹ Irrespective of the correct assertion, the uncertainties of Pierre Fabre could have been solved if the CJEU clearly conveyed the confines of its statements. A uniform EU-legal system needs to be uniformly understood.

Pierre Fabre did not provide with general principles of the legal situation. There is consequently an opening for a selective distribution network that prohibits online distribution in an absolute manner to be objectively justified. This will be analysed in Chapter 5.

4.3 Conclusions of the Above Research

The above research has provided us with answers to the questions of this thesis stipulated in Chapter 1.2. For the readers' convenience, the following text will also repeat parts of the research worth knowing before the final analysis in Chapter 5.

The Legality of Selective Distribution Networks in EU Competition Law

Article 101(1) TFEU

Selective distribution networks are anti-competitive and restrict competition by object in the absence of an objective justification. The two Metro cases have concretized the objective justification analysis with four cumulative criteria. The impact of the Metro-test and the extended application to luxury goods in the two Leclerc cases means that

¹⁸¹ Zelger, Bernadette, "Restrictions of online sales and vertical agreements: Bundeskartellamt vs. Commission? Why Coty and Asics are compatible", 14 *European Competition Journal* 2/3 (2018), 445-461, p. 446 et seq.

selective distribution networks aiming to preserve the luxury image of goods have legitimate aims. Such a network will be exempted, provided that it fulfils the other criteria in the Metro-test (i.e., qualitative in its nature, not discriminatory and proportionate).

VBER

A selective distribution network that is not objectively justified can still be exempted through the VBER, provided that the market shares of the parties are less than 30 % each, the agreement is not a hard-core restriction and it is assumed with sufficient certainty that the agreement will satisfy the conditions in Article 101(3) TFEU. The VBER applies thus irrespective of the nature of the goods. However, a block exemption may be withdrawn at a later stage if its *ex post* effects are incompatible with the conditions stipulated in Article 101(3) TFEU.

Article 101(3) TFEU

The individual assessment is an examination of the agreement's efficiency-enhancing effects and whether it can outweigh the anti-competitive effects inherent in a selective distribution network. The consumers shall receive a fair share of the resulting benefits. The article is therefore a concretization of the main objective of increasing consumer welfare within the EU.

In theory there is no threshold with regard to the percentage of the market shares of the parties. In practice it is understood that the efficiency-enhancing effects will never outweigh the anti-competitive effects if the market shares exceed 30 % in the relevant market. This is the rationale of why the VBER has stipulated this threshold as a prerequisite for its applicability. The VBER and Article 101(3) TFEU are therefore directly interconnected.

The VBER exists to facilitate the courts' reasoning when dealing with vertical agreements that may have efficiency-enhancing effects. In practice Article 101(3) TFEU will function as a safety valve for selective distribution networks that are not normally exempted but could be in an in-depth impact assessment of the agreements in the relevant market. The practical importance of this is that it ensures a certain degree of flexibility for national courts to allow selective distribution networks that

may be anti-competitive in their essence but that generate a lot of efficiencies in practice and thus increases consumer welfare. The same applies for networks that are *prima facie* granted a block exemption, but in actuality do not satisfy the conditions in Article 101(3) TFEU. The assessment may take into account the nature of the goods, the selection criteria of the network and the main objectives of the EU. Selective distribution networks for luxury goods will therefore have a larger possibility of being exempted in relation to non-luxury goods, as a dilution of the luxury image has been acknowledged by the CJEU to harm consumer welfare. The teleological interpretation method has therefore been incorporated in the assessment in Article 101(3) TFEU.

Selective Distribution Networks for Non-Luxury Goods

It is presumed that other goods than luxury goods will have difficulties of fulfilling the first and third criterion of the Metro-test concerning restrictions of online distribution. The same presumption exists regarding the applicability of a block exemption in connection to its non-withdrawal.

The Extent of the Restriction of the Online Distribution

Restrictions on the use of third-party platforms have been objectively justified (see Coty Prestige). Such restrictions are moreover not hard-core restrictions in the VBER.

An absolute ban of online distribution has on the other hand not been exempted. The possibility exists, however, for luxury goods due to Pierre Fabre's contextual applicability. It may furthermore be exempted through the individual assessment in Article 101(3) TFEU, provided that it produces sufficient efficiency-enhancing effects that outweigh the anti-competitive effects.

Unanswered Legal Issues

Neither the relevant provisions in the TFEU nor the conclusions by the CJEU in the processed case law have given an answer to the lingering question of whether non-luxury goods have the same extent of protection as luxury goods. This will be analyzed in the following Chapter 5. By comparing the legal status for luxury goods in relation to non-luxury goods the assumption is that the judicial relevance of the luxury-concept will be illuminated.

5 Final Analysis: With or Without Luxury

The analysis will, based on above research, compare the legal status between luxury goods and non-luxury goods. Coty Prestige has already established the legality of restricting the use of third-party platforms for the distribution of luxury goods. The discussion can thus be found in Chapter 4.2.5.

There is no need to compare the legal status under the VBER. The VBER does not take into account the nature of goods. It only takes into account the nature of the restriction. Restrictions on the use of third-party platforms do not qualify as hardcore restrictions under Article 4 (b-c) VBER. The same conclusion is applicable for non-luxury goods. There is, however, a mechanism that enables the Commission or the NCA to withdraw a granted block exemption from selective distribution networks that has ex post effects that are not in conformity with the conditions in Article 101(3) TFEU. The significant differences between luxury goods and non-luxury goods might lead to different results concerning the fulfilment of the criteria in Article 101(3) TFEU.

5.1 Restriction of Third-Party Platforms

5.1.1 Non-Luxury Goods

5.1.1.1 The Metro-Test (Article 101(1) TFEU)

The criteria in the Metro-test are cumulative. The proportionality test in the third criterion will emphatically be analysed as it is presumed that a restriction on the use of third-party platforms might be problematic in this regard. If the proportionality test entails the inapplicability of an objective justification, the analysis will not touch upon the other criteria. The second criterion only concerns the modelling and the implementation of the restriction as such. Discussing it will therefore be irrelevant for the purpose of Chapter 5.

In the following discussion the example of non-luxury brands of automobiles will be used. Presumable luxury brands such as Ferrari or Lamborghini are therefore excluded from the reach of the example. The Metro-test was initially established for

technically advanced consumer durables. Selective distribution networks for automobiles will therefore presumably have easier of fulfilling the Metro-test due to the products' technical features, which may require the implementation of quality and safety standards. The arguments will self-evidently differ based on the product category and the pursued objective. It is however presumed that if automobiles will not seemingly fulfil the Metro-test, then other non-luxury goods will not fulfil it either.

Example: Automobiles

The First Criterion – Legitimate Objective

Considering the fact that the automobiles in question are not luxury goods, the supplier cannot successfully argue that the objective of its selective distribution network is to protect the brand image. The protection of brand image has only been considered vital in presented case law if the brand is luxury (read Leclerc I-II, Copad Dior and Coty Prestige). A supplier of automobiles might on the other hand argue the need to provide professional service and maintain informational safety standards, as an automobile's improper usage might endanger the driver and others (cf. similar objective in Metro I).

The legitimate objective therefore relates to the supply of professional services and retention of informational safety standards in order to ensure the proper use of the automobile. For the attainment of the objective the supplier imposes a restriction on the use of third-party platforms. Presume that the restriction is qualitative in its nature and uniformly applied for all distributors in a non-discriminatory manner (read second criterion of the Metro-test).

The Third Criterion – Proportionality Test

The restriction shall be proportionate in relation to the pursued objective. Accordingly, the CJEU assessed the following questions in Coty Prestige:

1. Is the restriction of distribution in third-party platforms appropriate for attaining the pursued objective?
2. Does the restriction go beyond what is necessary to attain the pursued objective?

The authorized distributors are allowed to distribute the automobiles online, however it has to be done in the distributors' exclusive online shops. The CJEU argued in *Coty Prestige* that the lack of contractual relation between the suppliers and third-party platforms is a reason to prohibit online distribution for its authorized distributors in such channels. It enables the supplier to control and enforce that its imposed quality conditions on its distributors are complied with. The argument is of general validity and can also apply for suppliers of non-luxury goods. The non-fulfilment of the imposed quality standards might negatively affect the proper usage of the automobiles thereby risking the safety of the end-user and the lives of others.

Here it might be worth reiterating the fact that the prohibition of third-party platforms in *Coty Prestige* was not absolute, it only regarded discernible third-party platforms (i.e., whose names are visible for the consumers). The prohibition thereby preserved the product's sense of exclusivity. A third-party platform prohibition for automobiles needs to be as unrestrictive as possible. An absolute third-party platform prohibition would certainly go beyond what is necessary as there are other ways of upholding professional service and safety standards for the automobiles on the Internet. A restriction could comparatively still allow online distribution in third-party platforms that guarantee obedience and retention of imposed quality standards. Such a restriction would be warranted and as sufficient as an absolute prohibition in relation to the attainment of the legitimate objective.

The end-users of automobiles are furthermore legally required to be competent enough to drive an automobile (i.e., need to have a driver's license). The holding of a driver's license entails that even a unique model of an automobile would not render an otherwise competent driver unqualified with respect to its proper use.

The information of the specific features of the automobile can be provided online. A key aspect of distribution online is namely the transparency of product information. It is even directly uncommon for consumers of automobiles not to gather information of the specific model's particular features, as this will certainly affect their decision to buy the model.

The CJEU also weighted in the factor that the main online distribution channels are the authorized distributors' exclusive online shops to support the view that a third-party platform restriction did not go beyond what was necessary (see paragraph 54 in Coty Prestige). The significant difference between our example of automobiles and the luxury goods in Coty Prestige is however that the restriction of online distribution was fundamental for attaining the legitimate objective to preserve the luxury image. The same essentiality does not apply in our example. The objective of providing professional service and informational safety standards for the consumers of the automobiles can be maintained online (see the above paragraphs).

The assumption is accordingly that the courts would consider the prohibition on the use of third-party platforms unnecessary and disproportionate. It is also assumed that this will generally apply for other non-luxury goods in selective distribution networks that restrict online distribution.

5.1.1.2 Individual Assessment (Article 101(3) TFEU)

The processed case law from the CJEU have not assessed the agreements' possibility of being exempted under Article 101(3) TFEU. The idea is thus not to conduct a complete individual assessment, but illustratively analyse the probability of exemption with respect to our situation. The same will also be done in Chapter 5.2.1.2 for luxury goods in regard to an absolute prohibition of online distribution.

In spite of the *in casu* nature of the individual assessment it is *prima facie* possible to appreciate the pro-competitive effects that will be produced by maintaining the luxury image of luxury goods. It was established in Chapter 3 that luxury brands increase consumer welfare by virtue of its aura of luxury. Luxury goods are not valued based on functions, but on image. The same is not true for non-luxury goods. Luxury goods are therefore in a distinctive category that is separate from non-luxury goods that are classified in product categories based on functions or material aesthetics. It is therefore essential to differentiate our assessment based on the specific product category of non-luxury goods.

The example of automobiles in Chapter 5.1.1.1 will be used thoroughgoing in the individual assessment for continuity. Beware, however, of the fact that the arguments

are only illustrative in their nature and need to be specifically adjusted in consideration of the factual circumstances of each case. However, there are certainly particular arguments that may be of general validity. It is not necessary to analyse all of the criteria of Article 101(3) TFEU to establish the probability whether online restrictions for non-luxury goods, in general, can be exempted.

Example: Automobiles

A supplier of automobiles argues in line with the assessment in Chapter 5.1.1.1 and claims that the efficiencies *a*, *b* and *c* have been produced because of the online restriction. Let us suppose that this assertion is correct. The NCA or the Commission will undoubtedly question whether the restriction was necessary. The Internet as a market platform guarantees *inter alia* convenience, transparency, adequate information of products and many other benefits for the consumers. In what way does a restriction of online distribution produce efficiencies that are, arguably, impeded by its absence? For luxury goods the rationale is obviously connected to the aura of luxury, for non-luxury goods it is almost non-existent (see Chapter 5.1.1.1).

Consumer welfare is a main objective in EU Competition law. It is also a central component within the individual assessment in Article 101(3) TFEU. If the consumers are left worse off with the agreement than without it, the agreement will not be exempted. The advantages of e-commerce are factors that benefit the individual consumer and consequently increase the consumer welfare. A restriction on the use of third-party platforms will therefore undoubtedly weaken the consumer welfare.

A lot of the efficiencies that can be produced by a restriction of online distribution for non-luxury goods can concurrently be subsumed by the existence of online distribution. Such a restriction cannot therefore be considered indispensable for the attainment of the claimed efficiencies. Regardless, the efficiencies of such a restriction would not outweigh its negative effects considering its indisputable dilution of consumer welfare (see the above paragraphs).

In consideration of the above analysis, it will be *prima facie* presumed that a third-party platform restriction regarding the distribution of non-luxury goods will generally not be in conformity with Article 101(3) TFEU. A withdrawal of the block exemption benefit from the VBER is consequently imaginable.

5.2 Absolute Prohibition of Online Distribution

5.2.1 Luxury Goods

5.2.1.1 The Metro-Test (Article 101(1) TFEU)

Neither Pierre Fabre nor Coty Prestige dealt with this particular situation. A conclusion cannot therefore, in its entirety, emanate from these two cases. The Commission has taken a strict approach towards absolute prohibitions of online distribution in the Guidelines on Vertical Restraints. However, these guidelines are only of indicative nature and not binding for the courts to follow.

The luxury brand Louis Vuitton will be used throughout as an example in order to simplify the understanding of the analysis. The example of Louis Vuitton is intended to be illustrative, not factual.

Example: Louis Vuitton

The First Criterion – Legitimate Objective

Louis Vuitton, and other luxury brands for that matter, wants to preserve the luxury image of its branded goods. The aura of luxury is not solely dependent on the actual quality or craftsmanship of the Louis Vuitton bags. It is also significantly based on factors relating to the perception about the brand. In this regard the customer experience that takes place in the brick-and-mortar shops is important. The imagery, symbolism and emotional responses associated with the brand are often reflected in the professional services, store layout or unique atmosphere that enhance the overall shopping experience. The customer experience will subsequently affect the consumer's perception of the brand. These are components of the creation of a luxury brand that online distribution will probably never fulfil. Taking also into account the fact that exclusivity is the most frequently mentioned common denominator of the luxury-concept, limiting the distribution channels of the products will sustain this exclusivity.

An absolute prohibition of online distribution may consequently have the effect of preserving the aura of luxury of Louis Vuitton's products. According to the Court in Coty Prestige, this is a legitimate objective to set up a selective distribution network.

An absolute prohibition of online distribution will therefore be unproblematic in regard to the fulfilment of the first criterion of the Metro-test.

The Second Criterion – Qualitative, Uniformly Applied and Non-Discriminatory

Louis Vuitton argues therefore that the aura of luxury of their luxury bags is directly connected with the usage of distribution in solely brick-and-mortar shops. Louis Vuitton cannot successfully argue for an absolute prohibition of online distribution for its authorized distributors without also correcting itself to that prohibition. If the aura of luxury dilutes because of online distribution, then this dilution applies irrespective of the party. The credibility of the supplier and the presumable non-discriminatory nature of the restriction would surely also be contested if the supplier would sell the luxury bags online.

The Third Criterion – Proportionality Test

The CJEU argued in *Coty Prestige* that the absence of contractual relationship between a supplier and third-party platforms is a factor that may necessitate a restriction of online sales in third-party platforms. The situation we are dealing with here is, however, different from *Coty Prestige*. Our situation concerns an absolute prohibition of online distribution regarding luxury goods. Whereas in *Coty Prestige* the goods were luxury but the prohibition of online distribution was not absolute. The situation is also different from *Pierre Fabre* where the prohibition of online distribution was absolute, however the goods in question were not considered luxury. The argument is nevertheless, as argued in Chapter 5.1, of general validity and may also apply in our situation. However, this only relates to the appropriateness of the prohibition for the attainment of the objectives, not the necessity of it.

The CJEU highlighted in *Coty Prestige* that the restriction at issue was not an absolute prohibition of online distribution such as the one in *Pierre Fabre*. The Court therefore indicated that an absolute prohibition would go beyond what is necessary. All of the arguments made by the CJEU in *Coty Prestige* supporting the view that the third-party platform restriction was necessary oppose conversely an absolute prohibition of online distribution. However, the CJEU concluded in *Coty Prestige* that it is necessary to view the judgement of *Pierre Fabre* in the light of its specific context and concrete

circumstances. The same reasoning might perhaps also apply in respect to the judgement of the CJEU in *Coty Prestige*.

Luxury goods are categorized in a distinctive form of product category. It has accordingly been handed an extra sphere of protection as its preservation increases the consumer welfare within the EU (see to this extent *Coty Prestige*). E-commerce is simultaneously also significantly important for attaining the consumer welfare and other main objectives (i.e., protection of the market as a whole, competition as such and overall retention of a highly competitive social open market economy). An absolute prohibition of online distribution entails therefore a collision between two important facets of the market and the competition.

Considering that the luxury-concept comprises of many different components equally intertwined in the creation of a luxury brand there are other ways of preserving the luxury image. An absolute prohibition of online distribution seeking to uphold the maximum level of a few of those components (i.e., customer experience in brick-and-mortar stores and exclusivity) will therefore be considered as unnecessary. However, the aura of luxury shall not be seen as fixed for all luxury brands. The significance of the components may differentiate depending on the product category of the luxury products. The degree of luxury also differentiates from brand to brand. Some luxury brands might have a higher degree of luxury compared with other luxury brands. They might need an extra sphere of protection, as their aura of luxury will be more valuable than the one in other luxury brands. There will consequently be other less restrictive mechanisms to preserve the luxury image of the products. We can be sure that Louis Vuitton has already proceeded with implementing these mechanisms. However, this nevertheless does not negate the importance of an absolute prohibition of online distribution in our example in order to effectively preserve Louis Vuitton's specific degree of luxury.

There are consequently both arguments pro-absolute online prohibition and arguments anti-absolute online prohibition. In so far the CJEU has abstained from concretizing the luxury-concept. Depending on which factors the NCA, the national courts and the CJEU determine to be essential for maintaining the main objectives of EU Competition law an absolute prohibition of e-commerce will be more or less justified.

It depends on what aspects the CJEU, the national courts or the NCA consider are more valuable to protect from a teleological perspective:

- E-commerce versus the luxury image.
- A sufficient degree of luxury versus a strong degree of luxury.

This would require that the CJEU consider it possible to quantify the aura of luxury. As the CJEU has abstained from defining and elaborating on the luxury-concept there is no guidance that can elucidate an accurate assessment on this issue.

5.2.1.2 Individual Assessment (Article 101(3) TFEU)

The First Criterion – Producing Efficiencies

It has already been established that it is possible to appreciate the pro-competitive effects that a preservation of the luxury image might have (see Chapter 5.1.1.2). This corresponds with the first criterion of the assessment. The efficiency gains will more or less depend on the degree of luxury and its creation of value in the distinctive luxury brand. The produced efficiencies will hence differentiate contingent on the particular luxury brand.

The Second Criterion – Consumer Welfare

An absolute prohibition will eliminate all the benefits that come with e-commerce thus diluting the consumer welfare. However, the consumers have a direct interest in maintaining the image of the luxury brand, as the luxury image is co-dependent on the fact that consumers consider the products as luxury. The safeguarding of the luxury image creates value for the consumers and therefore intrinsically enhances consumer welfare. These are two colliding interests that consumers have in regard to online distribution of luxury goods.

It is essential that the assessment be made within the confines of the relevant market. The anti-competitive effects of an absolute prohibition need to affect the particular customer group. The overall impact on consumers is the decisive factor. If the majority of the customers purchase the luxury products in brick-and-mortar stores the customer group will be less affected by the prohibition. The main objectives of the EU will thus to a large degree still be upheld in spite of the absolute prohibition.

The benefits of e-commerce will also be less important if the supplier has a lot of brick-and-mortar stores in different geographical areas, especially with regard to the benefits of accessibility and geographical scope. However, the distribution of goods in solely brick-and-mortar stores will always necessitate the movement of the customer.

There are accordingly factors of an absolute prohibition of online distribution for luxury goods that dilute consumer welfare and factors that enhance consumer welfare. Will the value of maintaining online distribution be worth it from the consumer's perspective when the luxury image deteriorates? The allure of purchasing luxury goods is strictly contingent on them having an accompanied luxury image. It would however be an exaggeration to proclaim that the luxury image of the goods would vanish with the continuance of distribution online. Even a deteriorated luxury image is still a luxury image. To echo the final sentences of the last paragraph in Chapter 5.2.1.1, the conclusion of the individual assessment will be contingent on which aspects the CJEU, the national courts or the NCA consider are more valuable to protect from a teleological perspective:

- E-commerce versus the luxury image.
- A sufficient degree of luxury versus a strong degree of luxury.

The Third Criterion – Indispensability of the Agreement

If the luxury image were directly correlated with the services, interior and atmosphere of the brick-and-mortar stores (i.e., non-usage of online distribution) the absolute prohibition would be reasonably necessary for the attainment of the efficiency gains. The produced efficiencies might never have had materialized in the absence of such a prohibition.

However, the above-said is contingent on if the image of particular luxury brands is significantly dependent on the distribution in solely brick-and-mortar stores. Louis Vuitton cannot argue in these terms. It is one of the most valuable luxury brands in the world operating its apparel business both in the real-world market and on the Internet. In consideration of these factors an indicium is illuminated that the preservation of luxury can be achieved by other means than prohibition of online distribution, at least regarding luxury brands in fashion. Of course contemporary

luxury brands differ from traditional and globally known luxury brands such as Louis Vuitton. Contemporary luxury brands have on the other hand emerged in a market landscape where online distribution is standard practice; distributing their goods solely in brick-and-mortar stores would be improbable.

The Fourth Criterion – Elimination of Competition

E-commerce has grown exponentially over time and the Internet is now the dominant market platform. The distributors are therefore keen to distribute the goods online because of the economic gains they would receive. If a supplier prohibits distribution online in a selective distribution network this would consequently limit a large number of potential distributors of those products. Such a prohibition would therefore substantially limit intra-brand competition. The anti-competitive effects of such a prohibition would presumably be even greater in the future, as the development of e-commerce has exponentially moved from real world markets to online markets these last decades. This development is sure to be continued.

A selective distribution network that prohibits e-commerce will therefore have a real trouble of being in conformity with the fourth criterion of Article 101(3) TFEU and therefore with the provision in its entirety (read cumulative criteria).

5.2.2 Non-Luxury Goods

It was analysed and subsequently presumed in Chapter 5.1.1.1 that third-party platform restrictions in selective distribution networks for non-luxury goods would probably not be objectively justified under Article 101(1) TFEU. The same was true regarding the individual exemption in Article 101(3) TFEU. Evidently, these presumptions also extend to more restrictive prohibitions of online distribution. It will therefore be directly assumed that absolute prohibitions regarding the distribution of non-luxury goods online will generally not be exempted.

6 Conclusions

The purpose of this thesis was to research the judicial relevance of the luxury-concept in regard to the question of whether selective distribution networks that prohibit the distribution of luxury goods online are legal in EU Competition Law. The research has in combination with the final analysis elucidated the differentiated extent of protection contingent on the nature of the goods.

A selective distribution network aiming to preserve the luxury image will have a legitimate objective. There are undoubtedly other legitimate objectives to set up a selective distribution network. However, it was presented in Chapter 3 that the luxury image is by its very nature interconnected with the consumers' perception of the goods as luxury. The signification of this is twofold: First, it will always be *prima facie* presumed that preserving the luxury image is the same as to preserve the proper quality of luxury goods. Secondly, it justifies particular restrictions of online distribution because such restrictions might effectively preserve the luxury image of goods by upholding their exclusivity rendering them appropriate and necessary.

The same generalised assumption, as presented in the above paragraph, does not apply for non-luxury goods. The legitimate objective and consequently the restriction of online distribution will always have to be precisely customized to the specific categorization of the goods concerned and their protective needs therein.

Furthermore, it was analysed and sequentially presumed that a legitimate objective, other than to preserve a luxury image, will seldom necessitate restrictions of online distribution. It is difficult to imagine a legitimate objective for non-luxury goods that cannot be attained without restricting online distribution. The syllogism of this results in a conceivable presumption that a restriction of online distribution for non-luxury goods will probably not be objectively justified or individually exempted. A granted block exemption would surely also be withdrawn at a later stage.

Luxury goods have therefore been granted an extra sphere of protection in EU Competition law. The characteristics and components of the luxury-concept correspond with the protective elements that are guaranteed through the set up of a

selective distribution network and a restriction of online distribution. Accordingly, the CJEU has objectively justified selective distribution networks for luxury goods that prohibit distribution in discernible third-party platforms.

There is moreover a possibility for a selective distribution network to be exempted when it prohibits all online distribution. It ultimately depends on what aspects that the CJEU considers more worthy of protecting for the attainment of EU's main objectives:

- E-commerce versus the luxury image.
- A sufficient degree of luxury versus a strong degree of luxury.

Such a clarification from the CJEU on the valuation of these aspects is lacking for the time being.

The luxury-concept is thus an essential factor for the legality of a selective distribution network that restricts online distribution. The luxury-concept is accordingly judicially relevant in these situations. The purpose of this thesis has consequently been fulfilled.

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Data extracted in December 2018.

I, Jonathan Ketto, was registered on this course for the first time in the fall semester 2019 and nor have I participated in any previous examination dates.