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ADAPT AND SURVIVE: AN ANALYSIS OF THE PERSPECTIVES FOR SELECTIVE DISTRIBUTION SYSTEMS IN THE AGE OF ELECTRONIC COMMERCE

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1. INTRODUCTION

> "Contemporary events differ from history in that we do not know the results they will produce. Looking back, we can assess the significance of past occurrences and trace the consequences they have brought in their train. But while history runs its course, it is not history to us. It leads into an unknown land and but rarely can we get a glimpse of what lies ahead"[1].

Selective distribution systems are, it must be acknowledged, not extraneous to the literature, courts and other competition enforcers and stakeholders in general. However, as the legal framework applicable thereto was being built in the last decades of the 20th century, a parallel phenomenon, the internet – as trivial as it may seem nowadays –, was gaining momentum and – to avoid the word "revolution" – reached a stage in which its influence on markets, business' and consumer's habits might bring the traditional justifications and rationale of selective distribution systems into question.

In this context, the purpose of the present dissertation is to explore the interplay between selective distribution systems and the internet – specifically in what concerns online sales. In order to achieve such a purpose, Section 2 will address selective distribution as a business model, discussing the traditional concepts, rationale and efficiencies related to it. In Section 3, a brief analysis of the competitive concerns stemming from selective distribution systems will be carried out, along with the relevant framework construed at the European level in order to address such concerns.

Before a conclusion is drawn, Section 4 will deal with the influence of online sales on selective distribution from both an internal (referring to the behaviour of undertakings

[1] Hayek, Friedrich August von. *The road to serfdom* (Routledge, 2001) p 1.

in a selective distribution system) and from an external perspective (referring to the effects to selective distribution systems stemming from the behaviour of undertakings outside thereof). It will be shown that as with other legal and economic institutions, selective distribution, either conceptually or practically, is not a static institution and must adapt/be adapted to the context in which it is inserted in order to persevere.

Although it is admittedly difficult to get "a glimpse of what lies ahead while history runs its course", it will be argued that selective distribution and online sales are not incompatible, and that the relevant framework so far construed at the European level allows for an optimistic view towards the future.

2. SELECTIVE DISTRIBUTION AS A BUSINESS MODEL

2.1. The concept and the rationale of a selective distribution system.

Little doubt surrounds the fact that the acquisition of (and payment for) a given good or service by the costumer marks the moment in which the economic activity performed by an undertaking reaches its goal. Nevertheless, the importance of the stages that precede this purchase is evident, and of particular relevance to the present work is the stage in which the supplier makes such goods and services available to the costumer: distribution.

There are indeed multiple ways in which distribution can occur, which range from the direct activity performed by the supplier itself to an indirect system, in which the mentioned entity would limit is role to setting its wholesale price and then leave the following stages of the distribution process to third parties. The choice of which road to take, bearing in mind the assumption that undertakings are rational entities, would be defined by an assessment of efficiency in regards to the nature of the goods or services being dealt with.

In this context, a selective distribution system sits somewhere in the middle of the spectrum. In such a system, the supplier does not distribute its goods or services

directly neither leaves distribution to the sole performance of third parties. More specifically, as defined in Regulation no. 330/2010[2]:

> "[…] selective distribution system means a distribution system where the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to distributors selected on the basis of specified criteria and where these distributors undertake not to sell such goods or services to unauthorised distributors within the territory reserved by the supplier to operate that system".

Selective distribution systems – and the undertakings mentioned in the precedent paragraph – are established by an ensemble of agreements by means of which the number of distributors and the possibilities of resale are limited by a set of "selection criteria linked, in the first place, to the nature of the product"[3] in question.

Inherent in this kind of agreement, as shown by the very definition transcribed in the precedent paragraphs, is the prohibition of distributors to sell the contract product(s) to third-party distributors outside the system implemented by the supplier, which directly correlates to the logic and the need to maintain the structure of the system itself[4].

The nature of the parameters established by the supplier in order to select its distributors is often classified as qualitative (for instance, where such parameters relate "to the technical qualifications of the reseller and his staff and the suitability of his trading premises" in regards to the product in question[5]) or quantitative (where such parameters "more directly limit the potential number of dealers by, for instance, requiring minimum or maximum sales, by fixing the number of dealers, etc."[6]). The implications of this distinction between will be properly addressed in the following topics.

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[2] Commission Regulation (EU) No. 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ [2010] L 102/1.
[3] European Commission, Guidelines on Vertical Restraints [2010] OJ C130/01, paragraph 174, hereinafter referred to as "the 2010 Guidelines".
[4] This feature was limited by the entry in force of Regulation 330/2010, as it will be discussed in the appropriate topic.
[5] Case 26/76 *Metro SB-Großmärkte GmbH & Co. KG v Commission* [1977] ECR 1875, paragraph 20.
[6] 2010 Guidelines, paragraph 175.

From the second half of the 20th century onwards, the acute growth in the use of selective distribution systems in various sectors and industries, from automobiles[7] to computers[8], perfumes and cosmetics[9] amongst others, attired the interest of the European Commission, courts, legislators and scholars to the subject. Relevant case law is relatively abundant, and despite the fact that decisions tend to take into consideration the factual particularities of each case, a general framework for the subject has been built with a considerable success at the European level.

The following topic will explore the economic justifications that lead undertakings to opt for establishing a selective distribution system.

2.2. Justifying a selective distribution system: economic efficiencies.

In a perfectly competitive – and therefore hypothetical – market, with homogenous products, abundant information and multiple, atomistic suppliers, it is generally understood that the demand for a given product would be determined by the price charged for it. However, in "real world" scenarios price competition is not the only factor influencing demand[10].

In this context, for instance, suppliers might wish to establish limitations to the number of distributors and conditions to the retail activity with a view to alter the existing degree of homogeneity in the market. In order to make its product stand out from the crowd, such a supplier may decide to give its product a distinctive character through the creation and maintenance of a brand – therefore limiting the number of and/or building an image of sophistication for its outlets – or assuring that costumers are provided with a qualitative service when purchasing a given product[11].

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[7] For instance, see Commission Decision 75/73/EEC of 13 December 1974 relating to a proceeding under Article [101 TFEU], case no. IV/14.650 – *Bayerische Motoren Werke AG* [1975] OJ L 29, p. 1; Case C-158/11 *Auto 24 Sarl v Jaguar Land Rover France SAS* [2012] 5 CMLR 3.

[8] For instance, see Commission Decision 84/233/EEC of 18 April 1984 relating to a proceeding under Article [101 TFEU], case no. IV/30.849 – *IBM Personal Computers* [1984] OJ L 118, p. 24.

[9] For instance, see Case 99/79 *Lancôme SA v Etos BV* [1980] ECR 2511; Case T-19/91 *Vichy v Commission* [1992] ECR II-415; Case C-439/09 *Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la Concurrence* [2011] 5 CMLR 31.

[10] *Metro v Commission*, paragraph 21.

[11] "As such, they might consist, for instance, of pre-sales or after-sales services, technical qualifications and training of the staff, equipment or location of the premises, stock and inventory of contract goods, or even the commitment not to sell competing products of inferior quality in order not to damage the

It is true that a similar outcome might be achieved by vertical integration within the supplier's company or group of companies itself[12]. However, the establishment of a selective distribution system has proven to be more efficient than the alternative in a wider array of situations, by increasing the amount of sales effort put on by the retailer, sales staff enthusiasm or influence on sales, the quality of the information and post sales service offered to costumers at the point of sale[13].

Additionally, "selective distribution systems may protect the authorised distributors' investment and promotional efforts against other retailers' temptation to 'free-ride"[14] as well as against eventual misbehaviour by the supplier itself through the guarantee of a long-term supply arrangement and reduce logistics costs[15].

Ultimately, the efficiencies attributed to a selective distribution system relate to the supplier's effort to be in a strong position to face inter-brand competition, i.e., competition with other suppliers of similar products of different brands. However, this comes at a cost for intra-brand competition, i.e., competition between suppliers/retailers of products from a same brand. The next section will explore the competitive concerns most commonly associated with selective distribution systems and the legal framework surrounding the subject.

3. SELECTIVE DISTRIBUTION IN THE CONTEXT OF EU COMPETITION LAW

3.1. Competitive concerns stemming from selective distribution systems.

As it was previously mentioned, the popularisation of selective distribution systems became evident from the second half of the 20th Century onwards and the European Courts and institutions rapidly turned their attention to it. To that effect, the system of

image of the brand". De Faveri, Cristiana, *The assessment of selective distribution systems post-Pierre Fabre* [2014] Global Antitrust Review p 163-194 at 164.

[12] Marsden, Philip and Whelan, Peter, *Selective distribution in the age of online retail* [2010] ECLR 31(1) p 26-37 at 27.

[13] Buettner, Thomas *et al*, *An economic analysis of the use of selective distribution by luxury goods suppliers* [2009] Euro.C.J. 5(1) p 201-226 at 205.

[14] De Faveri, op. cit. at 167.

[15] 2010 Guidelines, paragraphs 107(d) and 185.

mandatory notification of agreements implemented by Council Regulation no. 17/62[16] played an important role[17]. Since selective distribution systems are created by one or by an ensemble of agreements, their compatibility with competition law is assessed, mainly, within the framework of Article 101 of the Treaty on the Functioning of the European Union (hereinafter, "TFEU") – and its equivalents in the previous European treaties.

Agreements establishing selective distribution systems came into the radar of competition authorities because of the inherent risks to competition in a limitation of the number and/or of the autonomy of distributors. As the Commission put it in its 2010 Guidelines, "the possible competition risks are a reduction in intra-brand competition and, especially in case of cumulative effect [i.e., the simultaneous existence of a number of selective distribution systems], foreclosure of certain type(s) of distributors and softening of competition and facilitation of collusion between suppliers or buyers"[18].

In this context, intra-brand competition may be harmed by initiative of the retailers and distributors (collusion) but also by initiative of the supplier – by, for example, imposing restrictions on price, output, tying, etc. downwards in the chain of distribution. On the other hand, cumulative effects arise "when several suppliers and their buyers organise their trade in a similar way"[19], which allows for a greater degree of transparency in a given market and enhances the likelihood of illicit collusion.

Traditionally, the analysis of a given agreement under Article 101 TFEU is carried out via a two-stage examination[20]. At the first stage, under Article 101(1) TFEU, one should examine the compatibility of such agreement with the internal market. However, a negative conclusion at the first stage does not necessarily lead to such

[16] Regulation No. 17/62/EEC of the Council of the European Economic Community: First Regulation implementing Articles 85 and 86 of the Treaty, OJ 013/62, 21/02/1962 p 204-211.
[17] As per the seventh paragraph of the preamble to Regulation No. 19/65/EEC of the Council of the European Economic Community of 2 March 1965 on application of Article 85 (3) of the Treaty to certain categories of agreements and concerted practices, OJ 533/65, 06/03/1965 p 35-37
[18] 2010 Guidelines, paragraph 175.
[19] Idem, paragraph 105.
[20] Opinion of Advocate General Trstenjak of 4 September 2008 on Case C-209/07 *The Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd* [2008] ECR I-8637, paragraph 39.

agreement being declared void under Article 101(2). Under stage two of the compatibility test – Article 101(3) – the factors which would initially render the agreement in question incompatible with the internal market should be examined in contrast to the economic benefits (efficiencies) stemming from the same agreement. In case the latter are deemed to satisfactory offset the former, Article 101(1) might be declared inapplicable to such agreement.

The examination under Article 101(3), which is of particular interest to the subject of the present dissertation, may be carried out in the context of a block exemption or at an individual basis, in case the block exemption is inexistent or inapplicable to a specific case. Further consideration to this matter will be given throughout the present work.

Also, and accordingly to settled EU case law dating back to *Société Technique Minière*[21], agreements may infringe what now is Article 101 TFEU alternatively by object or effect. Generally, infringements by object are regarded as the more serious of the two categories, since in that case agreements are "by their very nature, […] injurious to the proper functioning of normal competition"[22]. In this context, the CJEU has observed that in order to inquire as to whether a given agreement is restrictive by object – or by its "own nature" – "regard must be had *inter alia* to the content of its provisions, the objectives it seeks to ascertain and the economic and legal context of which it forms part"[23]. Furthermore, "there is no need to take account of the concrete effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition"[24].

On the other hand, once it is demonstrated that an agreement does not have an anticompetitive object, attention should be turned to the effects thereof. In *Delimitis,* the CJEU asserted that "the effects of such an agreement had to be assessed in the context in which they occur and where they might combine with others to have a

[21] Case 56/65 *Société Téchnique Minière v Maschinenbau Ulm GmbH* [1966] CMLR 357 at 375-376.
[22] Case C-209/07 *Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meals Ltd* [2008] ECR I-8637, paragraph 17.
[23] Case C-501/06P *GlaxoSmithKline Services Unltd v Commission* [2009] ECR I-9291, paragraph 58.
[24] Joined Cases 56 and 58/64 *Établissements Consten Sarl and Grundig-Verkaufs-GmbH v Commission* [1966] ECR 299 at 342.

cumulative effect on competition" [25]. The assessment of the potential anticompetitive effects of an agreement requires, therefore, a much more thorough economic analysis.

In early case law, as perceived in *Société Technique Minière* and *Metro v Commission*[26], the CJEU observed that the potential restrictions of competition caused by exclusive and selective distribution agreements were not necessarily caused by the object of such agreements, but by eventual effects thereof, a position which was reinforced in and subsequent decisions. However, in the judgment of *Pierre Fabre*, the CJEU seems to have changed its view on the matter, having asserted that such agreements "in the absence of objective justifications", should be considered as restrictions by object[27].

It is worth pointing out that not only is the distinction between infringements by object or effect controversial on its own[28] but the outcome of the CJEU's decision in *Pierre Fabre* also looks contestable, as some might even attribute the controversy to "linguistic oversight"[29].

Nevertheless, it is the opinion of this work that it would not be appropriate to classify selective distribution agreements as restrictions by object, which could otherwise be the case of specific clauses[30] contained in such agreements, contrary to the established legal framework[31].

One might be forgiven for regarding the obvious limitations to the number and/or autonomy of distributors operating in a selective distribution system to restrictions to competition inherent in the "own nature" of such kind of agreements. However, it must

[25] Case C-234/89 *Delimitis v Henninger Brau AG [*1991] ECR I-935, paragraph 14.
[26] *Société Technique Minière*, at 375-376 and *Metro v Commission*, paragraph 21.
[27] *Pierre Fabre*, paragraph 39. This case will be further explored in an appropriate topic.
[28] Due to the limited scope of the present work it is not possible to further develop the subject. For further reference, see De Faveri, op. cit., at 170-175.
[29] Idem, at 190.
[30] In this sense, it should also be noted that in paragraph 33 of its judgment in *Pierre Fabre*, the CJEU itself phrased that "the question referred for a preliminary ruling must be understood as seeking to ascertain, firstly, whether the contractual clause at issue in the main proceedings amounts to a restriction of competition 'by object' within the meaning of Article 101(1) TFEU".
[31] For instance, see Vogel, Louis, *Efficiency versus regulation: the application of EU competition law to distribution agreements* [2013] JECL&P 4(3), p 277-284, at 282, and, in particular, the author's commentary on the CJEU's lack of reasoning in the case as to the steps leading to a finding of a restriction by object.

be borne in mind that this specific kind of distribution is established with a view to protect the market value of one specific kind of product and to promote efficiencies rather than to limit the number of distributors for its own sake. As the CJEU put it in *Metro v Commission*:

> "For specialist wholesalers and retailers the desire to maintain a certain price level, which corresponds to the desire to preserve, in the interests of consumers, the possibility of the continued existence of this channel of distribution in conjunction with new methods of distribution based on a different type of competition policy, forms one of the objectives which may be pursued without necessarily falling under the prohibition contained in Article [101(1)], and, if it does fall thereunder, either wholly or in part, coming within the framework of Article [101(3)]"[32].

Moreover, it must be recalled that the aim of EU Competition law is not to protect competitors, but to maintain an effective competition structure, which would ideally improve the existing degree of consumer welfare[33]. Therefore, it is the kind of foreclosure that leads to consumer harm that is the relevant competitive concern[34] in play, not foreclosure in itself, which could even happen in general as a result of what is known as competition on the merits, as the CJEU has already observed[35].

Furthermore, it is worth noting that the kind of analysis traditionally carried out by EU competition enforcers when it comes to assessing the compatibility of selective distribution systems to Article 101 TFEU ("the *Metro* test", which will be further detailed ahead) is in itself evidence of the factual, economic approach characteristic of an effects-based analysis.

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[32] *Metro v Commission*, paragraph 21.
[33] See, for instance, Case C-202/07P *France Télécom SA v Commission* [2009] ECR I-2369, paragraphs 103-105
[34] Rousseva, Ekaterina and Marquis, Mel, *Hell freezes over: a climate change for assessing exclusionary conduct under Article 102 TFEU* [2013] JECL&P 4(1), 32. Although the title and the core of the cited article deal with the analysis of anticompetitive behaviour under Article 102 TFEU, it brilliantly addresses foreclosure under both Articles 101 and 102 TFEU, thus the reference.
[35] Case C-209/10 Post Danmark A/S v Konkurrencerådet, [2012] 4 CMLR 23, paragraphs 21 and 22.

There are, it must be acknowledged[36], voices that argue that the *Metro* test would not represent but an example of an objective justification for selective distribution systems altogether. However, one must bear in mind that not every vertical restraint creates competitive concerns. As the Commission puts it, vertical restraints are naturally "less harmful than horizontal restraints and may provide substantial scope for efficiencies. [Competitive concerns] only arise if there is insufficient competition at one or more levels of trade, that is, if there is some degree of market power at the level of the supplier or the buyer or at both levels"[37].

In this sense, accordingly to Advocate General Mazák, it would be erroneous to attribute an anticompetitive object to one whole kind of agreements "solely using an abstract formula"[38]. The next topic will explore how the European competition enforcers have built the framework for the analysis of selective distribution systems.

3.2. The evolution of the European framework for the assessment of selective distribution systems.

In 1965, Council Regulation no. 19/65 was implemented and its Article 1(a) allowed the Commission to issue a regulation establishing the conditions according to which Article [101(1) TFEU] should not apply to agreements entered into by only two undertakings and relating to obligations in "respect of exclusive supply and purchase for resale" – with no specific reference to selective distribution.

Despite being authorised to do so in 1965, only in 1983 did the Commission implement its own regulations on distribution and purchasing agreements, which on their turn had reflexes on the subject dealt in the work. As a result, the principles regarding the compatibility of selective distribution systems with the provisions of the Treaty(-ies) on competition law were initially construed by the European judicature.

[36] De Faveri, op. cit., p 190, footnote 126.
[37] 2010 Guidelines, paragraph 6.
[38] Opinion of Advocate General Mazàk of 3 March 2011 on Case C-439/09 *Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la Concurrence* [2011] ECR I-9419, paragraph 26.

In this context, the seminal case on selective distribution is the 1976 decision in *Metro v Commission*[39]. The underlying dispute in the instant case was the refusal by a supplier of electronic goods to admit Metro into its network of distributors, since the latter had not agreed to a number of conditions to which the former subjected the grant of the status of distributor.

The now-denominated Court of Justice of the European Union ("CJEU") asserted that the maintenance of a degree of "workable competition" in "the sector covering the production of high quality and technically advanced consumer durables" did not preclude the compatibility of selective distribution systems with Article [101(1) TFEU] provided that a number of conditions were satisfied[40]. The CJEU reunited these conditions in the *Metro* test, which has been repeatedly applied by European competition enforcers since then.

Accordingly to the mentioned test, a selective distribution system is compatible with Article 101(1) TFEU when: (i) the nature of the product in question demands the use of selective distribution, (ii) suppliers establish objective selection criteria of a qualitative nature, which are laid down and applied in a uniform and non-discriminatory manner to potential applicants and (iii) the application of such criteria occurs within the limits of what is strictly necessary for the functioning of the distribution system[41].

It must be acknowledged that the *Metro* test did not remain immune from criticism and that the satisfaction of requisites (i) and (ii) might reveal itself troublesome on different occasions[42]. Additionally, the limitation imposed by the *Metro* test to qualitative selection criteria has been overcome by subsequent regulations and decisions[43]. Nevertheless, considered the scope of the present dissertation, it will be assumed that requisites (i) and (ii), where applicable, will be satisfied, and focus will be given to the third part of the test, i.e., confinement of the criteria laid down in selective distribution

[39] See footnote 5.
[40] *Metro v Commission*, paragraph 20.
[41] Idem.
[42] For a thorough analysis of the matter, which escapes the scope of the present work, see Jones, Alison and Sufrin, Brenda, *EU Competition Law* (5th Edition, Oxford, 2014) p 806 ff.
[43] As evidenced, *inter alia*, by the CJEU's decision in Case C-158/11 *Auto 24 Sarl V Jaguar Land Rover France SAS* [2012] 5 CMLR 3 and 2010 Guidelines, paragraph 176.

systems (either qualitative or quantitative) to what is strictly necessary to their functioning.

Following the evolution of the legal framework, in 1983 the Commission adopted Regulations no. 1983/83[44] and 1984/83[45], which regulated the non-application of Article [101(1) TFEU] to agreements of exclusive distribution and purchasing, respectively, and established conditions for the exemption of clauses ancillary to such contracts within the scope of Article [101(3)]. Of particular interest to the present dissertation is the introduction in Article 2(2)(c) of Regulation no. 1983/83 of the distinction between active and passive sales and the affirmation of the legality of the prohibition of active sales by the exclusive distributor of products covered by the contract outside the contract territory[46].

During the period of validity of said regulations, the now-denominated General Court was presented with a series of cases in which the use of selective distribution systems in the cosmetic/perfumes sector was put into question. In the *Groupement d'Achat Edouard Leclerc cases*[47], the General Court summarised the case law to that date and broadened the scope of application of the *Metro* test in order for it to encompass other sectors where by virtue of the nature of the products or the requirements for their distribution selective distribution systems were justifiable and capable of protecting the interest of consumers[48].

Both Regulations no. 1983/83 and 1984/83 only exempted exclusive dealing agreements entered into by no more than two undertakings (Article 1 of each Regulation). It was only after the expiration of said norms that the European Council

[44] Commission Regulation (EEC) No. 1983/83 of 22 June 1983 on the application of Article 85 (3) of the Treaty to categories of exclusive distribution agreements, OJ L173, 30/06/1983, p 1-4.
[45] Commission Regulation (EEC) No. 1984/83 of 22 June 1983 on the application of Article 85 (3) of the Treaty to categories of exclusive purchasing agreements, OJ L173, 30/06/1983, p 5-11.
[46] This distinction will be further referred to in this dissertation. Nevertheless, for the sake of clarity, two elements, when found coexisting, are capable of distinguishing active from passive sales: an effort to sell and the fact that this effort is directed to a specific group of customers or customers in a specific territory. For further information, see 2010 Guidelines, paragraph 51.
[47] Case T-19/92 *Groupement d'Achat Edouard Leclerc v Commission* [1996] ECR II-1851 ("*Leclerc I"*), relating to Yves Saint-Laurent products and Case T-88/92 *Groupement d'Achat Edouard Leclerc v Commission* [1996] ECR II-1961 ("*Leclerc II*"), relating to Givenchy products.
[48] *Leclerc I*, paragraphs 113 and 117 and *Leclerc II*, paragraphs 106, 111 and 112.

adopted Regulation no. 1215/99[49]. Said Regulation, amongst other provisions, altered the text of Article 1(a) of Council Regulation no. 19/65, and allowed the relevant exemption to be granted for agreements entered into by "two or more undertakings", at different levels of the production or distribution chain and concerning the conditions under which trade would occur[50]. Moreover, opposed to the previous Regulations, the text of Article 1(1)(a) of Regulation 1215/99 no longer made reference to its application to "agreements of exclusive supply and resale".

In other words, the legislative alteration introduced by Regulation no. 1215/99 authorised full selective distribution systems to be declared compatible with Article 101(1) by the Commission. On the other hand, it is worth mentioning the insertion of Article 1a to Regulation no. 19/65, which allowed the Commission to exclude from the relevant exemption "certain parallel networks of similar agreements or concerted practices operating on particular market", in a clear attempt to avoid the creation of the already mentioned cumulative effect and minimise the risks of collusion.

Also in 1999, in the light of the alterations brought by the Council's new Regulation, the Commission introduced Regulation no. 2790/99[51] and its accompanying Guidelines[52], which unified its two previous ones and inaugurated a different regime for the assessment of exclusive and selective distribution systems. This new Regulation introduced, *inter alia*, market share thresholds for the exemption of selective distribution agreements and provided for the stipulation exclusive dealing agreements for the provision of services[53]. Moreover, for the first time, the Commission directly addressed the interplay between vertical distribution systems and the internet, which will be addressed further ahead.

Upon expiration of Regulation no. 2790/99, the Commission introduced the already mentioned Regulation no. 330/2010 and the accompanying 2010 Guidelines, which

[49]Council Regulation (EC) No. 1215/1999 of 10 June 1999 amending Regulation No 19/65/EEC on the application of Article 81(3) of the Treaty to certain categories of agreements and concerted practices, OJ L148, 15/06/1999, p 1-4.
[50] Idem, Article 1(1)(a).
[51]Commission Regulation (EC) No. 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, OJ L336, 29/12/1999, p 21-25.
[52] Commission notice: Guidelines on Vertical Restraints, OJ C291, 13/10/2000, p. 1-44.
[53] Whittaker, Jane, *Distribution agreements need urgent review* [2001] Euro.Law. 13, p 31-32.

happen to be in force at the time of writing. The new Regulation and Guidelines introduced significant changes to the relevant framework, of which two are particularly relevant for the present work: (i) the more direct and comprehensive treatment given – especially by the 2010 Guidelines – to the use of the internet by members of selective distribution systems and (ii) the limitation imposed on the restriction of sales to unauthorised distributors to the territory in which the selective distribution system operates.

The identified features influence – and to a certain degree, challenge – selective distribution from both an internal and an exterior perspective, which will be the focus of the following section.

4. SELECTIVE DISTRIBUTION UNDER THE FRAMEWORK OF REGULATION 330/2010 AND THE INFLUENCE OF INTERNET

It was previously mentioned that the third condition established in the *Metro* test (the requirement that the application of the selection criteria by the supplier occurs within the limits of what is strictly necessary for the functioning of the distribution system) would be of great relevance to the present work. That statement is now justified by the fact that the alterations introduced in the legal framework applicable to selective distribution by Regulation no. 330/2010 and the influence on the internet thereof are directly related to this proportionality criterion and the functioning of the discussed distribution systems.

As the commission put it in the 2010 Guidelines, "[t]he internet is a powerful tool to reach a greater number and variety of customers than by more traditional sales methods"[54] but it also brings about many advantages to costumers that might question the traditional justifications raised in defence of selective distribution systems.

First, at a retail level, costumers have unprecedented access to extensive information. Not only are costumers able to do price comparisons between a number of suppliers, but the information as to how to use, recommended care, pros and cons of any given

[54] 2010 Guidelines, paragraph 52.

product are readily available, sometimes by the part of suppliers but also by the means of reviews made by other consumers. Then, there is the matter of choice and comfort: a wide array of similar products is showcased to the costumer, who is provided with better conditions to make an educated choice, irrespective of the suppliers' business hours and without the costumer having to leave his/her home or workplace.

The growth of e-commerce in recent times is easily perceived and nowadays approximately 50% of the European population shop online[55]. Furthermore, the Commission has already stated that it is committed to keeping e-commerce growing and to turning "the Digital Single Market into a reality"[56].

The current section will address the extent to which the internet, and e-commerce in particular, is capable of exerting influence in the markets to the point of interfering to the logic of selective distribution systems. In order to achieve a clearer result, the analysis will be carried out both from an internal (referring to the behaviour of undertakings in a selective distribution system) and from an external perspective (referring to the effects to selective distribution systems stemming from the behaviour of undertakings outside thereof).

4.1. The internal perspective: effects of e-commerce on the liberty of undertakings in a selective distribution system.

Despite the inexistence of any specific provision in Regulation no. 330/2010, the Commission's stance as regards internet sales by members of a distribution system could not be any clearer: "[i]n principle, every distributor must be allowed to use the internet to sell products"[57]. In fact and in light of the Commission's previous decisional practice, such a stance should not come as a surprise.

[55] European Commission, Memo no. 4922/2015 of 06 May 2015. *Antitrust: Commission launches e-commerce sector inquiry – factsheet*, available at <http://europa.eu/rapid/press-release_MEMO-15-4922_en.htm>, accessed on 20 July 2015.
[56] European Commission, speech of Commissioner Vestager no. 4704/2015 of 26 March 2015, available at < http://europa.eu/rapid/press-release_SPEECH-15-4704_en.htm>, accessed on 20 July 2015.
[57] 2010 Guidelines, paragraph 52.

Back in the early 2000s, when reviewing Yves Saint Laurent Perfumes' and B&W Loudspeakers' applications for individual exemptions under the framework of Regulation no. 17/62, the Commission had already manifested the illegality of any clause in selective distribution contracts as a result of which the sales of contract products over the internet would be prohibited[58]. It further clarified in *Yamaha* that a distributor's decision to sell over the internet and the functioning of such sales should not depend on the previous authorisation by the part of the supplier[59].

The 2010 Guidelines devote a detailed treatment to the use of e-commerce by members of distribution systems, having as a centre the distinction between active and passive sales and providing examples of online conducts which should fall into each category. The relevance of such a distinction for exclusive distribution systems lies in Article 4(b)(i) of Regulation no. 330/2010, which considers any limitation of the dealers' liberty to perform passive sales as a hardcore restriction.

According to the concept laid out in paragraph 51 of the 2010 Guidelines, what defines a sale as "active" is the effort put into by the seller to reach a specific territory or group of costumers, while in a "passive" sale the seller merely responds to an unsolicited request from an individual costumer.

In this sense, the Commission considers the mere use of a website, regardless of the potential number of languages it can be displayed in and the territory it can be accessed from to configure passive selling, "since it is a reasonable way to allow customers to reach the distributor"[60] and follows from the underlying technology (the worldwide web). On the other hand, setting up territory-based banners on third party websites and paying a search engine or online advertisement provider to have

[58] Case COMP/36533 – *Yves Saint Laurent*, unpublished. See also European Commission, press release IP/01/713 of 17 may 2001. *Commission approves selective distribution system for Yves Saint Laurent perfumes*, available at <http://europa.eu/rapid/press-release_IP-01-713_en.htm?locale=en>, accessed on 20 July 2015. Case COMP/37709 – B&W Loudspeakers, unpublished. See also European Commission, press release IP/02/916 of 24 June 2002. *Commission clears B&W Loudspeakers distribution system after company deletes hard-core violations*, available at <http://europa.eu/rapid/press-release_IP-02-916_en.htm>, accessed on 20 July 2015.

[59] Commission decision of 16 July 2003 relating to a proceeding under Article [101 TFEU] and Article 53 of the EEA Agreement in Case COMP/37.975 – *Yamaha*, unpublished. Available at <http://ec.europa.eu/competition/antitrust/cases/dec_docs/37975/37975_91_3.pdf>, accessed on 20 July 2015, paragraph 109.

[60] 2010 Guidelines, paragraph 52.

advertisements displayed specifically to users in a particular territory are examples of online active selling[61].

One must bear in mind, however, that those provisions are not always applicable to selective distribution systems, since Article 4(c) of Regulation no. 330/2010 treats as hardcore "the restriction of active or passive sales to end users by members of a selective distribution system operating at the retail level of trade". Therefore, a literal interpretation of such provisions allows the conclusion that retailers are free to venture in e-commerce, while at the wholesale level, in general (i.e., when wholesalers are not selling to end users), the restriction of active selling online still applies.

It is clear that the aforementioned Commission's decisions and Regulation limit a supplier's scope of action as to the behaviour of its distributors in terms of e-commerce, which might raise concerns as to the internal stability of the distribution system as a whole since, as mentioned before, it is built on selection criteria whose purpose is to give the supplier a higher degree of control over its chain of distribution.

However, this apparent loss of control seems to be counterbalanced – or at least attenuated – also in the Guidelines. The Commission recognises the suppliers' right to (i) require quality standards or criteria for the setting up and use of a website to resell its goods, (ii) condition the entry of applicants to the distribution system upon the previous ownership of brick and mortar shop or showrooms and (iii) require that customers do not visit distributors' websites through a site carrying the name or logo of a third party platform (such as Amazon or eBay)[62].

As for the mentioned criteria for the use of websites by distributor, the Commission states at paragraph 56 of the 2010 Guidelines that those should not necessarily be equal to the criteria imposed to offline distribution, but only pursue the same objective and achieve the same results, eventual differences being justified by the different nature of off and online sales. As an example, the Commission points out that the creation of restrictions on the quantity of identical articles to be sold to a same buyer

[61] Idem, paragraph 53.
[62] Ibidem, paragraph 54.

are a valid way to prevent unauthorised distributors from purchasing contract goods online and therefore would not infringe Article 4(c) of Regulation no. 330/2010[63].

The Commission's evident attempt to strike a balance between different interests (especially in what comes to the requirement of previous experience in brick and mortar shops for entry in a selective distribution system) has received criticism from stakeholders[64] and commentators[65].

As respectable as such criticism may be, the opinion of the present work is that the goal sought by the Commission is a valid one since it effectively allows parties to enjoy a greater degree of commercial freedom without jeopardising the values inherent in the products being distributed and the principles inherent in and the objectives sought by the establishment of such a distribution network itself. Proportionality applies both ways.

Moreover, even if the discussion currently takes place within the scope of the proportionality requirement laid out in *Metro v Commisison*, it does not mean that the remainder requirements are less important. In this sense, the Commission also observed that:

> "[W]here the characteristics of the product do not require selective distribution or do not require the applied criteria, such as for instance the requirement for distributors to have one or more brick and mortar shops or to provide specific services, […] the benefit of the Block Exemption Regulation is likely to be withdrawn"[66].

In that case, the hypothetical agreement would be scrutinised more carefully under Article 101(3) TFEU and eventual restrictions to competition stemming from its

[63] Ibidem, paragraph 56.
[64] For instance, see eBay, *Response to the Public Consultation on the European Commission's Review of the Vertical Restraints Regulation and Guidelines* (28 September 28), p 27, available at http://ec.europa.eu/competition/consultations/2009_vertical_agreements/ebay_en.pdf, accessed on 20 July 2015.
[65] Robertson, Viktoria H.S.E., *Online sales under the European Commission's Block Exemption Regulation on vertical agreements: part 2* [2012] ECLR 33(4) p 179-184 at 180.
[66] 2010 Guidelines, paragraph 176.

content, which were not sufficiently counterbalanced by the efficiencies sought, would be detected and dealt with individually.

In fact, it becomes clear that as, e-commerce gains momentum and alters the economic/legal context in which a selective distribution system fits and functions as a rational alternative, the internal pressure resultant from the diminished level of control enjoyed by the supplier as regards to the behaviour of its distributor might generate instability within the institute itself.

Nevertheless, it does not necessarily mean that the days of selective distribution systems are numbered. Rather, it might be argued that online distribution might indeed reduce its scope of application and, in that context, the first requirement of the *Metro* test, the one relating to the nature of the products and services being distributed, might assume greater relevance in determining where the adoption of such a system is adequate or even compatible with European rules on competition.

From a different perspective, the Commission has also been criticised for having implemented so significant changes not within the text of Regulation 333/2010 (and, to a lesser extent, Regulation no. 2790/1999) but via its(their) accompanying Guidelines[67], which are not binding for other courts and competition authorities. It is a fair point. Indeed, by transposing the material content of the Guidelines to the text of a Regulation the Commission could have taken a firmer stance.

On the other hand, the point of view adopted in this work diverges from the one underlying such criticism. First, it must be acknowledged that, in what comes to the consequences of the ubiquitous use of online tools in commerce, stakeholders in general still face a considerable degree of uncertainty. Thus, by further introducing relevant changes in the form of Guidelines, the Commission admits to that uncertainty but remains able to divulge its enforcement priorities within a general framework and with a higher degree of flexibility to correct eventual flaws detected on the way.

[67] Robertson, op. cit., at 183. See also Marsden et al., op. cit., at 33

In March 2015, almost five years after the 2010 Guidelines were published, Commissioner Vestager[68] admitted to that uncertainty and acknowledged that the Commission was still learning from its experience in recent cases but a comprehensive sector inquiry, which was formally launched in May 2015[69], was necessary to provide the Commission with a systematic view of the e-commerce sector.

Second, the criticism based upon the fact that the non-binding nature of the Guidelines as regards third parties would generate dissenting voices amongst European enforcers was proven impertinent by decisions issued by national courts and the CJEU. The *Pierre Fabre* case is an example of it, since in the national stages of the dispute, not only was the French Competition Authority's decision harmonious with the Commission's opinion, but it actually relied on and referred to the Guidelines accompanying the then-in-force Regulation no. 2790/2009[70].

The answer provided by the CJEU in *Pierre Fabre*, according to which the goal of maintaining a prestigious image was not sufficient to justify a *de facto* ban on internet[71] sales of Pierre Fabre's perfumes also follows the path beaten by the Commission, who acted as *amicus curiae* during the national and regional stages of the dispute.

It should also be observed that according to one interpretation of the *Pierre Fabre* judgment, the CJEU overruled its previous decisions in cases such as *Leclerc* in regards to the suitability of the aim to protect an image to luxury as a justification for a selective distribution system[72].

However, the point of view defended in the present work rejects such an interpretation. In its decision, the CJEU merely recognised the internet as a "method of marketing"[73]

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[68] European Commission, press release IP/15/4921 of 06 May2015, *Antitrust: Commission launches e-commerce sector inquiry*, available at <http://europa.eu/rapid/press-release_IP-15-4921_en.htm>, accessed on 20 July 2015.
[69] European Commission, speech of Commissioner Vestager no. 4704/2015 (see footnote 56).
[70] Saint-Esteben, Robert; Billard, Olivier; Jouvensal, Karin-Amélie, *On-line reselling and selective distribution networks: what can be learnt from the French experience?* [2010] JECL&P 1(3) p 245-252 at 247.
[71] *Pierre Fabre*, paragraphs 46 and 47.
[72] Knibbe, Jorren, *Selective distribution and the ECJ's judgment in Pierre Fabre* [2012] ECLR 33(10) p 450-451 at 451.
[73] Romano, Valerio Cosimo, *ECJ Ruling on the prohibition of on-line sales in selective distribution networks* [2012] JECL&P 3(4) 345-347 at 347.

and analysed the proportionality of the restriction caused by the relevant contractual clause as regards its alleged underlying objective but not the suitability of a selection distribution system in face of the nature of the product (i.e., whether or not perfumes can be distributed via selective distribution systems). At this point, the CJEU only extended the application of its previous case law to a different range of products[74].

In reality, the CJEU no more than reasserted the complementary character of e-commerce and selective distribution. In other words, nothing precludes suppliers or distributors inside a selective distribution system from selling over the internet, even if those sales are subject to quality standards and other parameters established by the supplier in order to protect the image of luxury of its products, as mentioned above and observed by the Commission at paragraph 54 of its 2010 Guidelines.

For the same reason, the conclusion reached in this topic, according to which the pressure imposed by e-commerce on the internal structure of selective distribution systems and the resultant stricter scope of application of such institute confer greater relevance to the nature of the product being distributed, remains unchallenged.

The next topic will address the influence that e-commerce might exert on selective distribution systems from the perspective of the behaviour of undertakings external to such systems.

4.2. The external perspective: selective distribution systems in the wider context of e-commerce.

As previously stated, on the core of a selective distribution system, as traditionally understood, lies the prerogative granted to the supplier to prevent its distributors from selling to parties external to the system. The caveat contained in the precedent sentence – "as traditionally understood" – owes itself to the second significant change

[74] At paragraph 44 of *Pierre Fabre*, the CJEU mentions the disproportionality of a ban of internet sales as regards "the need to provide individual advice to the customer and to ensure his protection against the incorrect use of products, in the context of non-prescription medicines and contact lenses", in an analogue application of Case C-322/01 *Deutscher Apothekerverband eV v 0800 DocMorris NV* [2003] ECR I-14887, paragraphs 107, 107 and 112 and Case C-108/09 *Ker-Optika bt v ÀNTSZ Dél-dunántúli Regionális Intézete* [2010] ECR I-12213, paragraph 76.

to be analysed in this work brought into the context of selective distribution systems by the framework established in 2010.

As per Article 4(b)(iii) of Regulation no. 330/2010, any "restriction of sales by the members of a selective distribution system to unauthorised distributors within the territory reserved by the supplier to operate that system" is to be regarded as a hardcore restriction. This provision differs from its equivalent in Regulation no. 2790/99 –Article 4(b) – in that the new one allows sales to third parties located outside the territory in which the selective distribution operates, whereas the previous Regulation forbade such practice altogether[75].

Regarded in a broader perspective, the alteration under debate seems justified by the Commission's concern about the integrity of the single market and the creation of artificial boundaries by undertakings. Data made available by the Commission in the fact sheet which accompanied the formal launch of the e-commerce sector enquiry[76] reveal a disparity between the share of the European population which have shopped online in 2014 (approximately 50%) and the share of the population which acquired products from a provider of goods and services based in another Member State (approximately 15%).

Whilst acknowledging that factors such as language barriers and consumer preferences might explain such a disparity, the Commission also collected and revealed data that indicate that contractual restrictions within distribution agreements might also play an important part in raising artificial barriers to cross-border electronic trade. Contractual reasons were cited by almost a third of the retailers consulted in a report, whereas another survey showed that from 19% to 29% of the undertakings engaged or willing to engage in e-commerce "declared that suppliers' restrictions affecting sales on online platforms constituted or would constitute a problem for their business when selling online"[77].

[75] Also, Article 1(e) of Regulation no. 330/2010, which contains the definition of "selective distribution system" differs from the correspondent provision of Regulation no. 2790/99 (Article 1(d)) in that the former also limits the undertaking by distributors not to sell to unauthorised distributors "within the territory reserved by the supplier to operate that system", a territorial limitation that did not exist in the latter.
[76] European Commission, Memo no. 4922/2015, see footnote 55.
[77] Idem.

Nevertheless, the new provision in Regulation no. 330/2010 has been perceived with a certain scepticism by the literature. As one commentator refers to the alluded change, "[i]t not only penalises suppliers who do not operate EU-wide selective distribution systems, but also undermines the reasons for using selective distribution in the first place"[78].

As it was mentioned in the previous topics, a certain degree of reduction in intra-brand competition on the behalf of enhanced inter-brand competition via gains of efficiency is not only inherent in but is also one of the objectives of a selective distribution system. Thus, it must be acknowledged that the opinion according to that the change brought by Regulation no. 330/2010 undermines the sheer logic of the system deserves some credit – and a closer look.

Within the reasoning described above, the narrower the territorial scope of a given selective distribution system, the more intense might be the pressure that the very system will suffer from external distributors, which once again contributes to undermine the underlying logic. One may argue, under a perspective inspired by game theory, that the assumed rationality of an undertaking will provide it with enough incentives not to sell to other distributors outside the territory in which the system operates, but neither the supplier nor the other members of the distribution system have any guarantee that this will actually happen.

This situation might become particularly problematic given the ubiquitous presence of the internet and the already mentioned growth in the popularity of online sales in the past years, which would allow undertakings located in any part of the world to trade products within the territories in which a selective distribution system operates and exert pressure thereon.

Within this context, two cases decided by the CJEU in 2011, despite dealing primarily with functions and the protection of trademarks in the context of e-commerce, may offer an interesting insight to the analysis carried out in this work.

[78] Velez, Mario, *Recent developments in selective distribution* [2011] ECLR 32(5) p 242-247, at 243.

4.2.1. *Interflora v Marks & Spencer*.

In the first of those cases, *Interflora v Marks & Spencer*[79], the CJEU's First Chamber received a reference for a preliminary ruling on the legal implications of the use, by Marks & Spencer (hereinafter, "M&S"), of the word "Interflora" (as well as variants made up of and expressions containing it) as a key word in internet services as regards the protection conferred to that same expression by a trademark registered on behalf of Interflora.

Interflora runs a worldwide distribution network[80] made up of florists with whom costumers may place orders in person, by phone or via the internet, the latter being fulfilled by the network member situated closest to the place where the flowers are to be delivered. On the other hand, M&S is one of the main retailers in the United Kingdom, whose business comprise a wide array of products and services, including flowers. Therefore, M&S competed with Interflora's network.

The dispute had at is core the use by M&S of keywords containing elements of Interflora's trademarks in an internet referencing system ("Google AdWords"). Referencing systems enable any undertaking, "by means of the selection of one or more keywords, to obtain the placing, in the event of a correspondence between one or more of those words and that/those entered as a request in the search engine by an internet user, of an advertising link to its website"[81] in a better spot in the list of results brought by such search engine.

In its ruling, the CJEU recognised the multiple functions exerted by a trademark (origin, advertisement, investment, etc.) and stated that its proprietor could only oppose to its use as a keyword in a referencing system where such use produced or would be liable to produce an adverse effect on one of the functions of the mark[82].

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[79] Case C-323/09, *Interflora Inc. and Interflora British Unit v Marks & Spencer plc and Flowers Direct Online Ltd*, [2011] ECR I-8625.
[80] As for the nature of the distribution network, i.e., whether selective, exclusive or other, the contents of the case do not provide enough elements for a conclusion.
[81] *Interflora v Marks & Spencer*, paragraph 10.
[82] Idem, paragraph 34.

However, what is of particular interest to this work is the fact that the Court ruled that the use of a trademark in the context of the case in discussion did not necessarily affect the functions of such trademark, but might, in some circumstances, interfere with (i)the origin function and (ii) the proprietor's use of a mark to "acquire or preserve a reputation capable of attracting consumers and retaining their loyalty"[83].

A series of considerations flow from such a ruling. First, the sheer use of a referencing system by an undertaking exterior to a distribution network may place such an undertaking in a more privileged situation than the authorised distributors in an exclusive or a selective distribution system at the wholesale level, thus exerting pressure on the stability of the system. This is because, as discussed in the previous topic, the use of referencing services is seen by the Commission as active selling[84], and active selling can be prohibited by suppliers in exclusive distribution systems and selective distribution systems, where the distributor is not at the retail level nor does sell to the end user (wholesalers)[85].

Second, it must be acknowledged that trademarks are often part of the content of agreements in selective distribution systems. Not only does Article 2(3) Regulation no. 330/2010 recognise this fact, but the system would lose its logic if distributors were no at least licensed to use any trademark belonging to the supplier with association to its distribution activities (for instance, it would not be reasonable to prohibit a dealer of cars from a certain brand to use the manufacturer's trademark in advertising).

In this context, it should be recalled that, as demonstrated in the previous topic, after the CJEU's decision in *Pierre Fabre* it is clear that the maintenance of a luxury brand image is not a reason enough to justify an outright ban on internet sales. However, the same Court's ruling in *Interflora v Marks & Spencer* might be interpreted as providing suppliers with grounds incentives to enhance the brand's imagine online in order prevent or at least make it more difficult to competitors to resort to referencing systems

[83] Ibidem, paragraph 96(1).
[84] 2010 Guidelines, paragraph 53.
[85] Regulation no. 330/2010, Articles 4(b)(i) and 4(c), respectively.

to advertise the same products covered by selective distribution systems (free-ride, in other words) without tarnishing the trademark.

In order to achieve such results, one possibility given to suppliers is to establish or refine quality standards and selection criteria for the resale of their products online, as suggested by the commission at paragraph 54 of its 2010 Guidelines. While some cases might require a broad course of action, in some cases a simple use of technologies to improve the appearance and functionality of the supplier' and distributors' websites might suffice[86]. Not only does this seem as a reasonable (and so far legal) strategy but it also responds to the criticism against the Commission's efforts to strike a balance between conflicting interests in the Guidelines as referred to in the last topic[87].

Third, but not less important, provided that a competitor's use of a supplier's trademark(s) within an internet referencing system do not produce an adverse effect on the functions of the mark(s) in question, such competitor could be able to effectively compete with the distributors of the product subject to the selective distribution system regardless of where it is located. It is true that in *Interflora v Marks & Spencer* the goods the distribution of which was under discussion (flowers) do not present the same characteristics than branded perfumes, computers, luxury watches, etc., but that does not mean that the reasoning developed in this topic could not apply to those products.

In that case, admittedly, a hypothetical selective distribution system would indeed be under pressure from external agents retailing the same products it intended to distribute. By establishing quantitative limits for online purchases from authorised distributors within the distribution system, as suggested by the Commission in the 2010 Guidelines[88], a supplier could reduce the pressure exerted by a single undertaking, without prejudice to the Commission's objective to overcome artificial barriers to a single online market.

[86] Collard, Christophe and Roquilly, Christophe, *Closed distribution networks and e-commerce: antitrust issues* [2002] International Review of Law, Computers & Technology 16(1) p 81-92 at 85.
[87] See page 16 ff.
[88] 2010 Guidelines, paragraph 56.

Finally, as concluded in the precedent topic, the more a product's nature requires a specific method (selective) of distribution, the more likely the supplier will be able to maintain the system's integrity in face of the behaviour of external agents and its limited scope of control over its authorised distributors' conduct.

4.2.2. *L'Oréal v eBay*.

The second case to be discussed under this topic is *L'Oréal v eBay*[89], judged by the CJEU's Grand Chamber, and which shares a similar factual background with *Interflora v Marks & Spencer*. In this case, L'Oréal, which had established and operated a selective distribution system for the marketing of its perfumes and cosmetics[90], initiated proceedings against eBay, a virtual marketplace, on the grounds that the latter had been infringing by itself and allowing third parties to infringe the former's trademarks in transactions carried out in eBay's European websites.

The alleged infringements were based on the facts – referred to in the case as "undisputed" – that (i) some products sold via eBay were counterfeits whilst others were destined to be sold in other markets and others were being sold without their original packaging and that (ii) eBay, under certain circumstances, helped individuals set up online shops and resorted to referencing services using elements contained in L'Oréal's trademarks as keywords.

The CJEU's Grand Chamber, *inter alia*, ruled that the trademark proprietor, in this case, L'Oréal, was entitled to prevent the sales, via eBay, of goods that had not been previously put in the European market by the supplier, were destined to be used as "testers" and free samples and/or had their original packaging removed. The Court's conclusions as to the use of words protected by trademarks as keywords in online referencing services were similar to the ones reached in *Interflora v Marks & Spencer.* Lastly, the CJEU fixed the parameters according to which the operator of the electronic market place may be held liable for the misuse of third parties' intellectual property rights by the users of such marketplace.

[89] Case C-324/09 *L'Oréal SA and others v eBay International AG and others* [2011] ECR I-6011.
[90] Idem, paragraph 27.

In many ways, this decision is relevant to the analysis carried out in the present work. First, because it made clear that – provided that the seller's activities do not encompass counterfeits or products that have not been introduced in the market by the supplier nor tamper with the original packaging – the functioning of an online marketplace is legitimate.

It is true that the previous statement does not carry much novelty. However, it must be noted that by agglutinating a number individual sellers, such electronic marketplaces are able to create a "cluster of offers" and act as a relevant competitor to the supplier's distribution system while making use of the resources provided by e-commerce, such as referencing services, which are not always available to members of an exclusive or selective distribution system[91].

Thus, even if a supplier's selection criteria restricts the access of its distributors to third party online platforms[92] – a restriction which may be reassessed in a short term by the Commission in its sector inquiry – an online marketplace such as eBay is capable of exerting an external competitive pressure on – and in some cases, interfere with the stability of – a selective distribution system.

Nevertheless, *L'Oréal v eBay* also shows that if a supplier's course of action against an online marketplace may be reduced under the logic of competition law, such a supplier may still rely on its intellectual property rights to protect the brand image or other values which the selective distribution system is designed to protect. In this context, one could argue that L'Oréal v eBay actually reinforces the CJEU's 1994 decision in *Metro v Cartier*[93].

In this case, Cartier operated a selective distribution network in the then-denominated European Economic Community ("EEC") for the marketing of luxury watches and the members of said distribution network had undertaken not to resell the contract products to unauthorised distributors within the EEC. Metro, on its turn, was not an

[91] See, for that matter, the comments made in relation to *Interflora v Marks & Spencer*, page 24.
[92] 2010 Guidelines, paragraph 54.
[93] Case C-376/92 *Metro SB-Großmärkte GmbH & Co. KG v Cartier SA* [1994] ECR I-00015.

authorised dealer in Cartier's network, but had managed, for a period of time, to acquire the latter's watches in territories outside the EEC – namely Switzerland – and resell them in direct competition with Cartier's distributors within the EEC[94].

However, Cartier's watches were sold with a manufacturer's guarantee (the post-sales service provided by the selective distribution system) through a stamped certificate issued in the moment of the purchase. The controversy arose when Cartier denied performing the guarantee services free of charge to watches sold by Metro[95].

In a reference for a preliminary ruling, the CJEU's Fifth Chamber stated that the "imperviousness" of (i.e., the lack of "holes") in a selective distribution system was not a condition for the validity of such a system under European competition law.

Furthermore, – and that is the particularity of the case which interests the most to the present work – the Court also stated that in addition to the fact that it was not necessary for the supplier to operate a worldwide network, it's denial to perform pre- or post-sales services to products purchased by costumers from distributors operating outside the authorised network was compatible with the logic of such a system and, therefore, valid[96].

Such a ruling, from 1994, is perfectly compatible with the priorities sought by the Commission as to the integrity of the European single electronic market and with the alterations brought in to the relevant framework by Regulation no. 330.2010, as previously discussed in this section[97].

Moreover, and bringing the CJEU's reasoning in *Metro v Cartier* to the context of electronic sales and electronic marketplaces in particular, it is safe to assume that a supplier in a selective distribution system may legitimately refuse to perform pre- or post-sales services to products purchased from distributors outside its authorised network.

[94] Idem, paragraphs 7-8.
[95] Ibidem, paragraph 10.
[96] Ibidem, paragraphs 32-34.
[97] See page 22 ff.

This might, admittedly, result in a difference between the prices charged by authorised and unauthorised online distributors and the usefulness/adequacy of selective distribution systems might again come into question. In this context, one might wonder "whether the quality service secured through selective distribution is of such value to certain consumers that other consumers should be forced to pay a premium in order to prevent free-riding and to maintain the integrity of the system"[98].

However, it should be noted that price competition is not the only factor influencing demand in a "real world" markets[99], especially one in which a selective system operates. Ultimately, the answer to the question transcribed in the previous paragraph will be given by the consumer itself, and it becomes clear, as previously stated, that the nature of the product, more than ever, becomes very relevant – if not determinant – to the adequacy of a selective distribution system in a given market.

As the present section shows, Marsden *et al*[100]. are right to state that despite the substantial changes introduced by internet and the regulations that followed, the current framework, including the European Court's jurisprudence, the relevant Regulations and the Commission's priorities and initiatives, is solid and harmonious enough to deal with such an effervescent subject as e-commerce and its impacts on "traditional" selective distribution in a way to preserve stakeholders' and consumer's interests through a regime of healthy competition.

A "fine tuning" in the mentioned framework is not only needed but welcome and to that aim, attention to consumers' preferences and the nature of the products being distributed, as first dealt in *Metro v Commission*, almost 40 years ago, will be of fundamental relevance.

5. CONCLUSION

[98] Marsden et al., op. cit., at 32.
[99] Metro v Commission, paragraph 21.
[100] Marden et al., op. cit, at 37.

The purpose of the present work was to trace the perspective for selective distribution systems in face of the influence exerted by the internet and electronic commerce. After a brief description of the institute, the objectives and efficiencies it seeks and the competitive concerns often associated therewith, it argued that selective distribution should not be regarded, *per se*, as restrictions to competition by object, although some clauses in such kind of agreements might indeed fall in that category.

In the following topics, it acknowledged that a number of factors inherent in electronic commerce are capable of limiting the suppliers' control over its distributors and the overall members' commercial liberty, therefore exerting pressure on the traditional functioning of a selective distribution system, both from an internal and an external perspective. Nevertheless, it is the opinion of the present work that such pressure will not necessarily result in the obsolescence or illegality of the institute, despite a reduction of its scope of application might be expected.

As it has been shown, the relative framework, consisting of the CJEU's jurisprudence, European Regulations and the Commission's decisional practice and priorities form a relatively solid and harmonious whole, capable of balancing the interests of the parties involved with the aim of maintaining a high level of consumer welfare through a healthy competitive single market. An additional "fine tuning" on said framework seems inevitable, and the Commission's recently-launched sector inquiry may give a valuable contribution thereto.

Nevertheless, the elements contained in this work allow the conclusion that so long as the principles laid out in the last forty years of case law can be preserved, the nature of the products being distributed will assume a greater relevance over the remainder of the requisites for the compatibility of selective distribution systems with Article 101 TFEU laid out in *Metro v Commission*, and will be paramount to the adequacy of such institute in regards to a given market, whether on or offline.

The Commission has already shown that a great benefit to stakeholders in general can be obtained as a result of the monitoring involved in a comprehensive sector

inquiry[101]. In the particular case, the outcome of the recently launched inquiry on electronic commerce might clarify the extent to which selective distribution systems might interfere with the functioning of the single (electronic) market and put the conclusions drawn in the present dissertation to an ultimate test.

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