

ONLINE DISTRIBUTION & COMPETITION LAW

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BRICK AND MORTAR VS ONLINE DISTRIBUTION

- Distribution channels and distribution agreement
- Restriction of online sales
- Ban on internet sales in a selective distribution system
- Brick and mortar vs online shops, positive effects of vertical restraints
- Preliminary report on the e-commerce sector inquiry, September 2016
 - Cross-border online restrictions
 - Restrictions to sell on online marketplaces
 - Online pricing restrictions

BRICK AND MORTAR VS ONLINE DISTRIBUTION

■ EMPLOI 18 Avril 2016

Bata va fermer 29 magasins en Suisse et supprimer 75 postes

PAR AWP L'enseigne spécialisée dans la chaussure Bata, qui compte 300 employés et entre 40 et 50 apprentis sur sol helvétique, aurait l'intention de se concentrer sur le commerce en ligne.



BRICK AND MORTAR VS ONLINE DISTRIBUTION

Economie Modifié le 24 août 2016



Le groupe Charles Vögele annonce des fermetures de succursales



Le groupe Charles Vögele annonce des fermetures de succursales Le 12h30 / 1 min. / le 24 août 2016

Confronté à la concurrence en ligne, Charles Vögele a subi un recul de son chiffre d'affaires sur le semestre. Des fermetures de succursales, dont le nombre n'est pas défini, sont prévues d'ici à la fin de l'année.

RTS INFO

BRICK AND MORTAR VS ONLINE DISTRIBUTION



Bata, Blackout, Happy Baby, Vögele, Switcher, mais également de nombreuses petites boutiques moins renommées, la liste des détaillants suisses qui ont dû restructurer ou mettre la clé sous la porte s'allonge. Et si l'on en croit la tendance, elle ne devrait pas

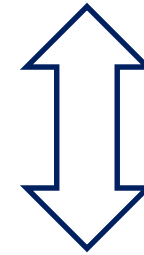
LE TEMPS

DISTRIBUTION CHANNELS AND DISTRIBUTION AGREEMENT

CHOICE OF THE APPROPRIATE DISTRIBUTION CHANNEL

- Vertical integration, distribution through subsidiaries
- Commercial agents
- Franchising
- Licensing
- Distribution through third parties

- Control over the supply chain, margins, terms and conditions



- No control over margins and prices, sharing of costs and capital investments, expertize in local markets

CHOICE OF THE APPROPRIATE DISTRIBUTION CHANNEL

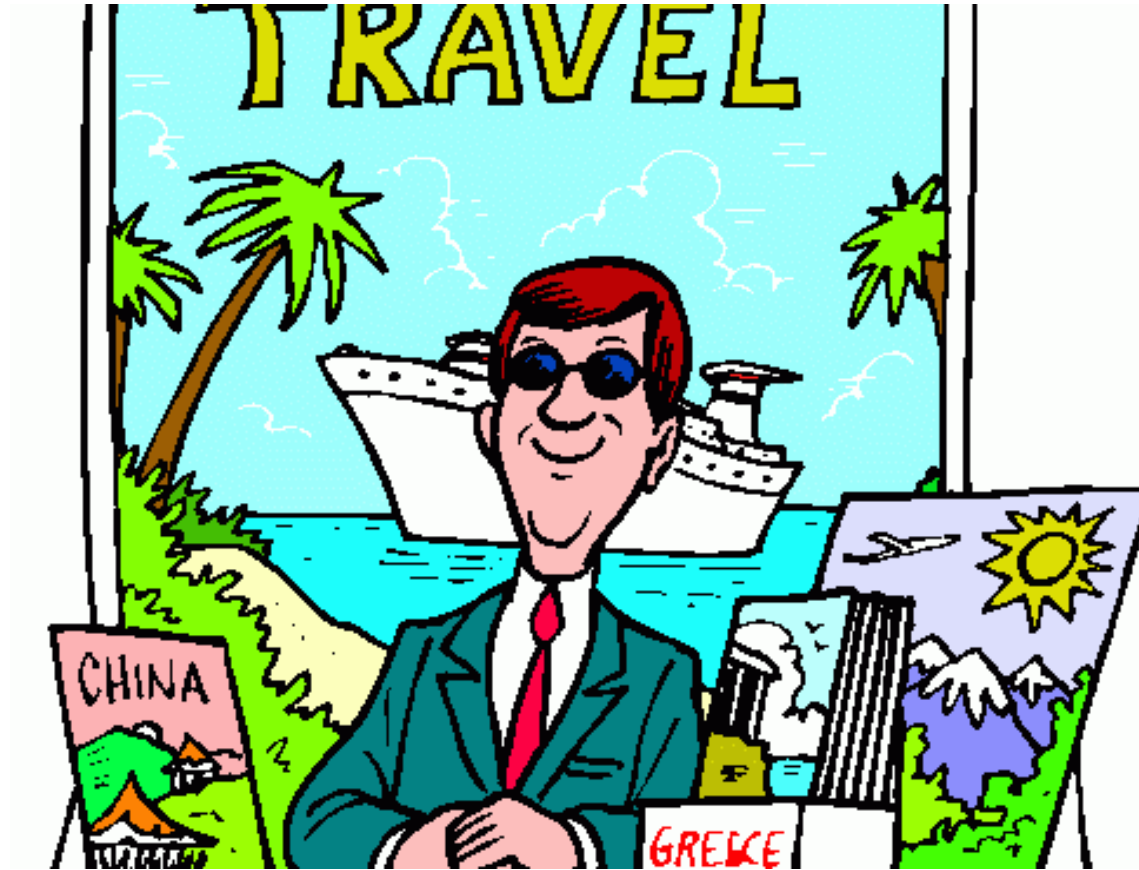


Vertical integration

Wholesale and retail distribution and stores are managed and run by subsidiaries or branches. Total control over margins and terms or conditions. Avoids double marginalization issues.

Single economic entity doctrine. No agreement under TFEU 101, only TFEU 102 applies.

CHOICE OF THE APPROPRIATE DISTRIBUTION CHANNEL



Agency agreements

Agent acts on behalf of the principal, who controls the margins, the final price and has a substantial control over agent's activities. Agent has no inventory and takes no commercial risks, and carries out limited marketing activities.

Agency agreements are not considered as agreements under TFEU 101.

CHOICE OF THE APPROPRIATE DISTRIBUTION CHANNEL



Franchising

Franchisee exploits franchisor's brand. Capital investment, marketing costs and risk is shared between franchisor and franchisee.

Franchise agreement are agreements between independent undertakings under TFEU 101

CHOICE OF THE APPROPRIATE DISTRIBUTION CHANNEL



Licensing

Distribution of technology, such as software or music.

Licensing agreements are agreements between independent undertakings under TFEU 101

CHOICE OF THE APPROPRIATE DISTRIBUTION CHANNEL



Distribution

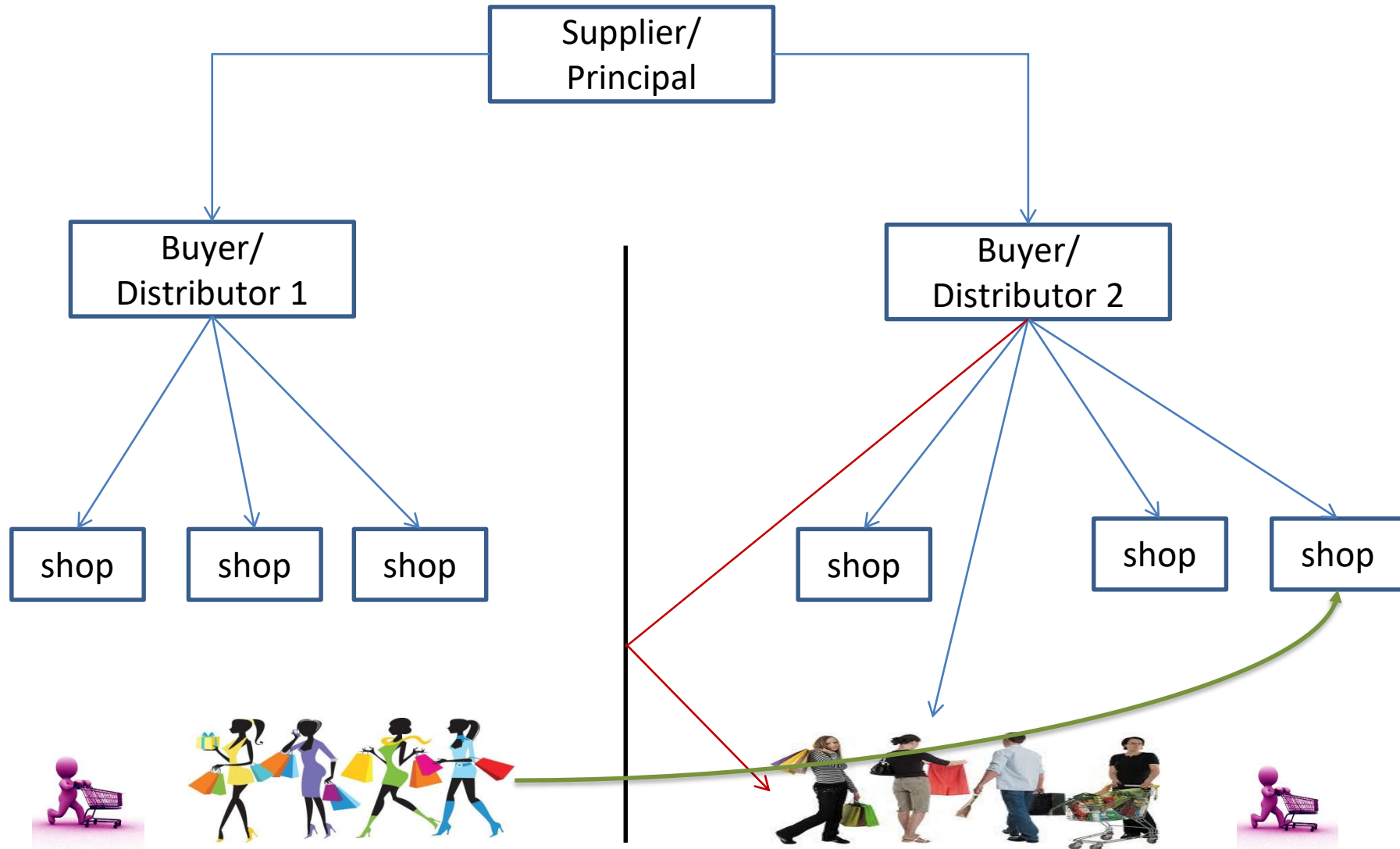
Supplier shares margin with distributors, shifts commercial risk to distributor. Distributor remains free to set resale prices.

Distribution agreements are agreements between independent undertakings under TFEU 101; heavily regulated by competition law.

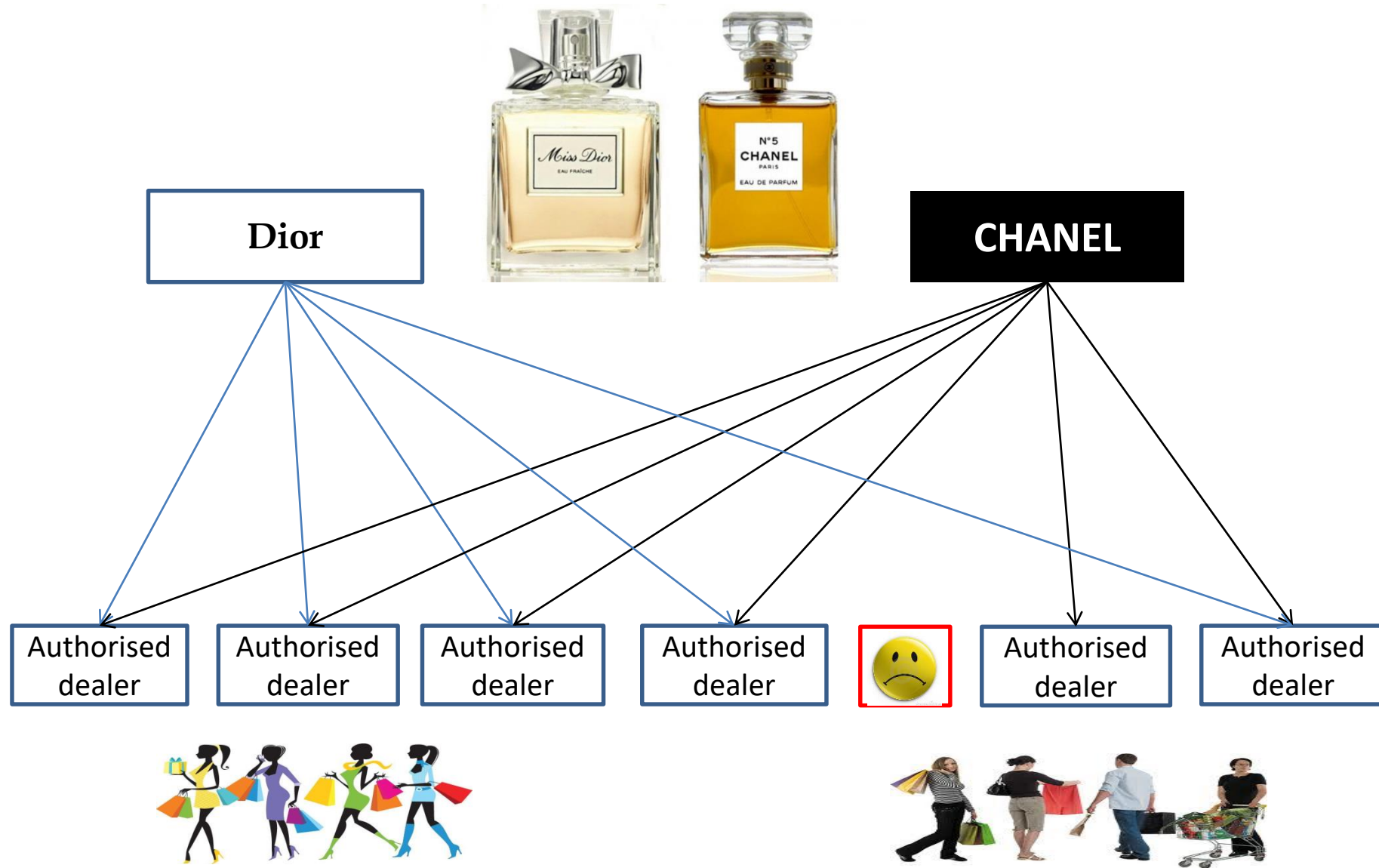
DISTRIBUTION CHANNELS AND DISTRIBUTION AGREEMENT

- Non-exclusive distribution
 - No territorial exclusivity
 - No territorial restrictions allowed
- Exclusive distribution (territory or customer)
 - Territorial exclusivity
 - Few territorial restrictions allowed (eg restriction of active sales)
- Selective distribution
 - Network of authorized (selected) dealers/distributors
 - Does not involve territorial exclusivity

EXCLUSIVE DISTRIBUTION



SELECTIVE DISTRIBUTION



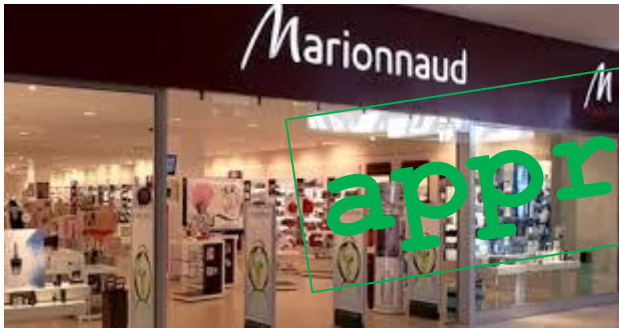
SELECTIVE DISTRIBUTION



approved



Not
approved



approved



Not
approved



SELECTIVE DISTRIBUTION



- Only authorised dealers may resell the products.
- Used to distribute branded final products.
- No territorial exclusivity. Selection criteria are linked to the nature of products.
- Qualitative - specialised area, trained staff, display material.
- Quantitative - minimum and maximum sales, number of dealers.





Brick and mortar vs online shops

Brick and mortar are traditional physical stores.

Amazon is an example of online business only.

Migros and LeShop are example of brick and mortar and online distribution for the same company.

eBay is a third party platform of exchange of goods.

POSITIVE EFFECTS OF VERTICAL RESTRAINTS

- Improvement of quality of services, improvement of **non-price competition**. Resolve the issue of sub-optimal level of investments and sales
- Resolve the issue of **free-riding** on promotion efforts of other distributor or supplier. See non-compete or single branding clauses
- Protect **investments** related to brand establishment. See exclusivity and territorial protection clauses
- Resolve the **hold-up problem** related to specific investments, allow recoupment. See quantity forcing if supplier investment or exclusivity if buyer investment
- Resolve **double marginalization** problem. See maximum resale pricing.

RESTRICTION OF ONLINE SALES



Pierre Fabre Dermo-Cosmétique SAS, Case C-439/09 (2011)

A contractual clause requiring sales of cosmetics and personal care products to be made in a physical space, resulting in a ban on the use of the internet for those sales in the context of a selective distribution system, amounts to a restriction by object

BAN ON INTERNET SALES IN A SELECTIVE DISTRIBUTION SYSTEM

“a contractual clause requiring sales of cosmetics and personal care products to be made in a physical space where a qualified pharmacist must be present, resulting in a ban on the use of the internet for those sales, amounts to a **restriction by object** within the meaning of that provision where, following an individual and specific examination of the content and objective of that contractual clause and the legal and economic context of which it forms a part, it is apparent that, having regard to the properties of the products at issue, that clause is not objectively justified.” (Pierre Fabre, pt 47)

BAN ON INTERNET SALES IN A SELECTIVE DISTRIBUTION SYSTEM

“Under Articles 2 and 3 of Regulation No 2790/1999, a supplier, in the context of a selective distribution system, may, in principle, benefit from an exemption, where its market share does not exceed 30%. It is apparent from the documents before the Court that **Pierre Fabre Dermo-Cosmétique’s market share does not exceed that threshold**. However, that regulation, has excluded certain types of restrictions that have severely anticompetitive effects, irrespective of the market share of the undertakings concerned.

A contractual clause such as the one at issue in the main proceedings, prohibiting de facto the internet as a method of marketing, **at the very least has 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.” (Pierre Fabre, pts 52 to 54)

BAN ON INTERNET SALES IN A SELECTIVE DISTRIBUTION SYSTEM

- A total prohibition of internet sales is not admissible, since restriction by object
- Measures that prevent passive internet sales are hardcore restrictions → such as automatic re-routes, blackout of web sites for customers outside the territory, use of credit card data to spot customers outside the territory etc.
- Supplier may however impose the same criteria as for off-line selling
- Supplier may also impose the existence of one or more brick & mortar shops

DEVELOPPEMENTS IN GERMANY AND FRANCE

- Aut. conc., avis n° 12-A-20 du 18 septembre 2012 relatif au fonctionnement concurrentiel du commerce électronique:
 - “si les critères d’agrément de la distribution sélective sont mis en œuvre par des opérateurs bénéficiant d’un pouvoir de marché significatif et tendent, par exemple, à limiter la pression concurrentielle susceptible d’être exercée par les distributeurs pure player, sans pour autant reposer sur une justification objective, de telles pratiques pourraient alors être qualifiées d’anticoncurrentielles et l’Autorité de la concurrence serait alors fondée à les sanctionner ou à retirer aux entreprises concernées le bénéfice de l’exemption par catégorie” (point 375).
- Appela Court Francfort, request for preliminary ruling, case C-230/16 Coty:
 - «Does it constitute an aspect of competition that is compatible with Article 101(1) TFEU if the members of a selective distribution system operating at the retail level of trade are prohibited generally from engaging third-party undertakings discernible to the public to handle internet sales, irrespective of whether the manufacturer’s legitimate quality standards are contravened in the specific case?»
- Bundeskartellamt, Asics (2015), Adidas (2014)

DEVELOPPEMENTS IN GERMANY AND FRANCE

- Bundeskartellamt, Asics (2015), Adidas (2014)
- Unlawful restriction of online sales of ASICS running shoes, 2015

“If manufacturers prohibit their authorized dealers from using **price comparison engines** and **online sales platforms** or from using the manufacturers' brand names in their own search engine advertisements, it will de facto no longer be possible for consumers to find the **smaller retailers**, in particular, in the internet. Many manufacturers of running shoes, as of recently including ASICS, have established their own online stores. They co-operate with large marketplaces such as Amazon. If these manufacturers simultaneously impose far-reaching online restrictions on their predominantly small retailers, the online business will ultimately be concentrated in the hands of the manufacturers themselves and a few large retailers or leading marketplaces.”



EU COMMISSION, PRELIMINARY REPORT ON THE E-COMMERCE SECTOR INQUIRY, SEPTEMBER 2016

- Cross-border online restrictions
- Restrictions to sell on online marketplaces
- Online pricing restrictions



CROSS-BORDER E-COMMERCE AND GEOGRAPHIC RESTRICTIONS TO SELL AND ADVERTISE ONLINE

Geo-blocking

Refusal to sell to customers abroad, for example by blocking access to websites, re-routing customers to websites targeting other Member States or by simply refusing to deliver cross-border or to accept cross-border payments

Geo-filtering

Online retailers allow customers to access and purchase goods or services cross-border, but offer different terms and/or conditions depending on the location of the customer in a Member State different from that of the retailer



CROSS-BORDER E-COMMERCE AND GEOGRAPHIC RESTRICTIONS TO SELL AND ADVERTISE ONLINE

Unilateral decisions

Unilateral business decisions of non-dominant retailers not to sell cross-border at all or not to sell cross-border to customers in certain EU Member States do normally not raise any concerns under the EU competition rules.

Agreements between manufacturers and retailers

Contractual restrictions which restrict retailers from selling cross-border to customers outside their home Member State.

CROSS-BORDER E-COMMERCE AND GEOGRAPHIC RESTRICTIONS TO SELL AND ADVERTISE ONLINE

Unilateral decisions

Geo-blocking measures based on unilateral decisions by non-dominant undertakings fall **outside the scope of Article 101 TFEU** whereas geo-blocking measures taken on the basis of agreements or concerted practices between distinct undertakings may fall under Article 101 TFEU (para 386)

Geo-blocking measures implemented by vertically integrated undertakings that produce goods and sell them through their **own websites** fall outside the scope of Article 101 TFEU. Equally, if a retailer **unilaterally decides not to sell** to customers in certain Member States and implements this decision through geo-blocking measures, that decision does not fall under Article 101 TFEU (para 388)

CROSS-BORDER E-COMMERCE AND GEOGRAPHIC RESTRICTIONS TO SELL AND ADVERTISE ONLINE

Agreements between manufacturers and retailers

Agreements/concerted practices which are aimed at partitioning national markets according to national borders or which make the interpenetration of national markets more difficult, in particular those which are aimed at preventing or restricting parallel exports, have as their object the restriction of competition pursuant to Article 101(1) of the TFEU.

Active vs passive selling in exclusive distribution systems

Irrelevance of distinction for authorized retailers in a selective distribution system

CROSS-BORDER E-COMMERCE AND GEOGRAPHIC RESTRICTIONS TO SELL AND ADVERTISE ONLINE

Active online selling – **contractual prohibition permitted**

Active sales mean actively approaching individual customers :

- by direct mail, including the sending of unsolicited e-mails, or visits;
- actively approaching a specific customer group or customers in a specific territory through advertisement in media, on the internet or other promotions specifically targeted at that customer group or targeted at customers in that territory;
- online advertisement specifically addressed to customers in certain territories
 - territory-based banners on third party website
 - paying a search engine or online advertisement provider to have advertisements displayed in a particular territory
- launching a website which is targeting a specific Member State by using the country-specific top-level domain (e.g. ".it" for Italy)

CROSS-BORDER E-COMMERCE AND GEOGRAPHIC RESTRICTIONS TO SELL AND ADVERTISE ONLINE

Passive online selling – cannot be prohibited contractually (hardcore restriction)

- Passive sales generally mean sales in response to unsolicited requests from individual customers including delivery of goods to such customers
- Sales that result from advertising or promotion aimed to customers in one's own territory/in nonexclusive territories but that also reaches customers in other distributors' (exclusive) territories or customer groups are considered passive sales
- **Geo-blocking**
 - blocking access to its website to customers located in another Member State
 - re-routing customers to an alternative website

CROSS-BORDER E-COMMERCE AND GEOGRAPHIC RESTRICTIONS TO SELL AND ADVERTISE ONLINE

Selective distribution system

- active or passive sales cannot be prohibited contractually (hardcore restriction)
- If a selective distribution system is operated across several Member States, cross-border sales restrictions between authorized distributors would amount to a hardcore restriction under Article 4(d) of the Vertical Block Exemption Regulation

RESTRICTIONS TO SELL ON ONLINE MARKETPLACES

- Marketplace restrictions encountered in the sector inquiry range from **absolute bans** to restrictions on marketplaces that do not fulfil certain **quality criteria**.
- Manufacturers provide a number of reasons for restrictions on sales via marketplaces. These relate essentially to the following aspects:
 - the protection of the image and the positioning of their brand;
 - combatting the sale of counterfeit products on marketplaces;
 - ensuring proper pre- and post-sale services by retailers;
 - protecting existing distribution channels from free-riding; and
 - concerns about the market position of certain marketplaces.

RESTRICTIONS TO SELL ON ONLINE MARKETPLACES

Ban of marketplaces - **No hardcore restriction**

The Commission does not consider (absolute) marketplace bans to constitute hardcore restrictions within the meaning of Article 4(b) and Article 4(c) of the Vertical Block Exemption Regulation as they do not have the object of segmenting markets in the internal market based on territory or customers.

They concern the question of *how* the distributor can sell the products over the internet and do not have the object to restrict *where* or to *whom* distributors can sell the products.

ONLINE PRICING RESTRICTIONS

Agreements whereby a distributor has to pay a **higher price for products intended to be sold online** than for products intended to be sold offline ("dual pricing"), may lead to limiting the retailer's online sales and hinder access to more and different customers online. Such agreements are in principle considered to be **hardcore passive sales restrictions**.

However, such agreements may, depending on the circumstances, fulfil the conditions of Article 101(3) TFEU and benefit from an individual exemption from the application of Article 101(1) TFEU. One of the key considerations in relation to different discounts offered to different channels is whether the discount is offered to **compensate higher costs** incurred by the manufacturer as a result of retail sales in one channel and not in the other. The granting of a **fixed fee** compensating for higher costs of one channel as compared to the other is one possibility to compensate for such costs, contrary to variable fees which are considered as liable to incentivise sales via one channel. (paras 543 and 544)

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