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An impartial commentator cannot but be surprised that, 45 years after the *Consten and Grunding* [1] ruling in the E.U., 34 years after the *Sylvania* ruling in the U.S [2]. and one year after the last reform undertaken by the European Commission (the "Commission") in this area [3], exclusive agreements ("exclusive agreements") remain at the spotlight. This is due to the existence of an inherent and, therefore, unsolved tension between the commercial needs of companies, the E.U. political imperatives regarding the Internal Market and modern antitrust theories. As a result, the European (including both at the E.U. and at the national level) case-law regarding exclusive agreement is somewhat heterogeneous and not always consistent. The increasing importance of Internet distribution (see Section II.3 below) further ads to the complexity of the analysis of these types of agreements.

The heterogeneity of solutions regarding exclusive agreement becomes even bigger when one takes into consideration, as the present issue of *e-Competitions* does, the practice of the National Competition Authorities ("NCAs") [4] and Courts [5] or the development of new methods of distribution such as the Internet [6]. Perhaps this is not as worrying as it might seem at first sight. On the one hand, there are effective safeguards ensuring the uniform application of European law [7]. On the other hand, the antitrust markets in which vertical restraints are usually imposed (*e.g.*, motor vehicles, *etc.*) are usually national and the different Member States have different legal traditions and jurisprudence and it is normal that they take them into account when assessing exclusive agreement, providing this does not hinder the uniform application of European law.

The key question regarding exclusive agreement is, of course, whether they are pro-competitive or anti-competitive. The answer, like in so many other areas of the law, is: "it depends". Broadly speaking, E.U. law and the Antitrust laws of the Member States deal with exclusive agreement in a relatively lenient way [8] providing the company applying them is not particularly large [9] and / or in the antitrust authorities' view avaricious in the terms it imposes to its commercial counterparts [10a Dutch Court of First Instance interpreted the Dutch equivalent (...] or when combining exclusive agreement with other vertical restraints [11].

I. The Economics of exclusive agreement

From an economics standpoint, the pros and cons of exclusive agreements are well known.

The primary concern is market foreclosure in case the supplier has a significant degree of market power [12] (in particular when combined with a network of exclusivity agreements concluded by other suppliers) [13]. However, the establishment of exclusive agreements is sometimes encouraged by Competition authorities as a means of increasing investments and enhancing brand image [14]. Also, the loss of intra-brand competition might be outweighed by strong inter-brand competition, which is ultimately more beneficial to consumers [15].

Although not limited to the following, the main pro-competitive justifications for exclusive arrangements include:

- To encourage dealers to promote a manufacturer's products more vigorously and to prevent inter-brand free-riding [16]. In the case of a buyer's agreement not to purchase competing products, the exclusive arrangement

may be necessary to prevent the buyer from free-riding on investments made by the seller. In case of a supplier's agreement not to supply the buyer's competitors, the arrangement may be necessary to prevent other dealers from free-riding on investments made by the buyer, *e.g.*, service or promotion [17].

- To encourage manufacturers to help dealers by providing services or information benefiting consumers. The application of exclusive distribution helps create and maintain a brand image by imposing a certain measure of uniformity and quality standardization on distributors, thereby increasing the attractiveness of the product to the final consumer and increasing its sales potential [18].

- To ensure a steady, reliable outlet of supply for a manufacturer so that it can make investments that increase efficiency or permit scale economies. For instance, the use of exclusive distribution by smaller market players in addition to brand-enhancing strategies can help them achieve the economies of scale necessary to compete effectively in the market, to the benefit of the end-consumers [19].

- To allocate capital more efficiently by overcoming information asymmetry. The usual providers of capital (*e.g.*, banks or equity markets) may provide capital sub-optimally when they have imperfect information on the quality of the borrower or where there is an inadequate basis to secure the loan. On the other hand, the supplier may have better information and be able, through an exclusive relationship, to obtain extra security for its investment [20].

II. The legal framework

1. A Little Bit of History: The Grundig Ruling, the Commission's Modernization Efforts and the new Block Exemption Regulations

E.U. Competition law has been criticized for decades for its alleged failure to take a sufficiently realistic view of whether an agreement restricted competition for the purposes of Article 101(1) TFEU. In addition, for many years both the Court of Justice of the European Union (the "CJEU") and the Commission appeared unwilling to recognize the efficiencies resulting from exclusive agreement [21]. Broadly speaking, the CJEU backed the Commission in following an (arguably) over-formalistic approach deriving from (i) the CJEU's concern, enshrined in the *Consten and Grunding* ruling, that exclusive agreement might be used to isolate national markets, erect barriers to trade, and maintain price differences between Member States; and (ii) the Commission's early ordoliberal philosophy which considered as potentially anticompetitive any agreement which restrained the parties' economic freedom [22]. Consequently, from its earliest days, the Commission took a broad view of what constituted a restriction of competition and considered that almost any exclusive agreement fell within the scope of the prohibition of Article 101(1) TFEU. In addition, it adopted a strict and formalistic approach when applying the Article 101(3) TFEU criteria to exclusive agreement, particularly when they involved "absolute territorial protection" [23]. As a consequence, businesses felt the need to secure exemptions for their distribution agreements [24].

The criticisms that the Commission's approach to exclusive agreement received, eventually led the Commission to introduce changes. *Regulations 2790/1999* [25] and *330/2010* [26] were adopted, thereby bringing several significant changes to the way in which vertical restraints were dealt with under Article 101 TFEU (which we will set out in more detail in Section b) below). The Commission has also recently issued a number of decisions adopting a more economically realistic approach [27]. And so have some NCAs including the so-called "new Member States" [28].

2. The applicable rules to exclusive agreement: Regulation 330/2010 and the Guidelines on Vertical Restraints

Regulation 2790/1999 adopted a flexible approach exempting from the prohibition of Article 101 TFEU almost all exclusive agreement provided that (i) the supplier did not exceed a specified market share threshold (of 30 per cent) (ii) and that the exclusive agreement in question did not contain any of the so-called "hard-core" restrictions (resale price maintenance, absolute territorial protection, the so-called "air-tight" exclusive territories, *etc*).

Regulation 330/2010 kept the same market share threshold of 30% but it established that the threshold should be met by *both* distributors and retailers, to account for the fact that some buyers may also have market power with potentially negative effects on competition.

Where an exclusive agreement is not exempted by *Regulation 330/2010*, the parties to the agreement will have to make their own assessment as to whether or not Article 101 TFEU is applicable. NCAs seem also willing to consider individual exemptions, providing the requirements of the *Guidelines on Vertical Restraints* are met [29]. It should be recalled that Member States and their NCAs were actively involved in the drafting of *Regulation 330/2010*, replying to questionnaires about their experience with the existing rules and participating in several official consultations [30].

Both European Competition law and the Competition laws of the different Member States treat exclusivities outside the block exemption differently, depending on which of the contractual parties (*i.e.*, supplier or distributor) bears the exclusivity and on the nature of the exclusivity. The *Guidelines on Vertical Restraints* accordingly provide a different treatment for those scenarios where (i) the exclusivity falls on the buyer, who is "*obliged or*

induced to concentrate its orders for a particular type of product with one supplier" (the so-called "single branding" agreements) [31]; (ii) the exclusivity falls on the supplier who "*agrees to sell his products only to one distributor for resale in a particular territory*" (the so-called "exclusive distribution") [32] or "*to a particular group of customers*" (the so-called "exclusive customer allocation" agreements [33]; (iii) the exclusivity falls on the supplier, who "*is obliged or induced to sell the contract goods only or mainly to one buyer, in general for a particular use*" (the so-called "exclusive or industrial supply" agreements) [34]. The analysis would be the following:

▸ i. The European Commission is concerned by Single Branding Agreements, *inter alia*, insofar as they might lead to the foreclosure of the market of competing suppliers and potential suppliers [35]. The French Competition Authority has recently applied the principles enshrined in the E.U. *Guidelines on Vertical Restraints* in the *Accentiv' Kadeos* , the *Orange Caraïbe / France Telecom* and the *FFF-Sportfive* cases [36]. The Bulgarian Supreme Administrative Court has applied the more effects-based approach that the Commission has enshrined in its Article 102 TFEU *Enforcement Priorities* [37]in its *Iosini* ruling [38].

▸ ii. As regards exclusive distribution , European Competition law tends to have a strict view on prohibitions of the so-called "passive sales", *i.e.*, prohibitions of sales deriving from unsolicited requests from individual customers [39]. NCAs have also applied these principles [40]. However, the "new" (2010)*Guidelines on Vertical Restraints* now provide for a specific set of circumstances where absolute territorial protection is allowed and the prohibition of the so-called "*passive sales*» are allowed for a period of up to two years when the prohibition is necessary to sell a new brand or sell an existing brand on a new market [41]. Even before the adoption of the new *Guidelines*, some NCAs had already adopted a more lenient view to restrictions hitherto considered hardcore [42].

▸ iii. For the European Commission, "*the main competition risk of exclusive supply is [the] anticompetitive foreclosure of other buyers*" [43]. This seems to be also the approach followed by the NCAs [44].

3. Exclusivities and the Internet

Most suppliers embrace the Internet as a powerful tool to target a broader range of consumers than can be reached through traditional advertising, and to obtain feedback allowing for a more accurate tailoring of their offerings in order to better meet demand. At the same time, there are many practical obstacles to a vibrant E.U. online trade market including both consumer and commercial issues as well as regulatory ones [45]. The E.U. policymakers are focused on overcoming these barriers through various regulatory measures [46].

Against this background, the revised Vertical Restraints regime broadly upholds the previous provisions regarding "passive sales" on the Internet [47]. For instance, according to the new *Guidelines on Vertical Restraints* [48], the use of the Internet is not considered a form of active sales into different territories or customer groups, since it is considered a reasonable way to reach every customer [49]. This leads to difficulties in practice since for example, a Spanish website translated into Polish is most likely targeted at Polish consumers living in Poland rather than Polish citizens living in Spain. However, the *Guidelines on Vertical Restraints* seem to imply that even these circumstances would qualify as a passive selling. It remains unclear in what circumstances a website could ever be considered to address specific customers and therefore constitute active selling.

In short, the Commission kept in its new *Guidelines on Vertical Restraints* the original provisions on passive sales with regard to online commerce. This might have been in part mandated by an overarching political imperative to support Internet commerce as the "magical" formula for E.U. market integration.

III. Are/should exclusivities be treated differently under Article 101 TFEU and under Article 102 TFEU?

Dominant companies may also enter into exclusive agreement. The evolution of the European rules on the abuse of dominant position is outside the scope of these pages but, broadly speaking, it could be argued that E.U. law has moved from a more formalistic approach to a more economics-oriented effect-based approach [50].

The problem, therefore, arises, as to the extent to which exclusive agreements should be analysed using a similar framework both under the rules prohibiting anticompetitive agreements and under the rules prohibiting abusive unilateral conduct or whether different rules should apply. In principle, if the Commission's latest (and more effects-based) thinking, as depicted in its *Guidance on Enforcement Priorities*, prevails, there should not be any reason why the applicable rules should vary depending on whether Article 101 or Article 102 TFEU are applied [51]: the focus should be on the foreclosure effects of the conduct and the result would be the same depending on whether Article 101 or Article 102 is applied. If the company enjoying market power and engaging in an anti-competitive exclusive agreement shares its profits with its counterparty to the exclusive agreement, the recent practice shows that in some cases the relevant

competition authorities have invoked the two provisions [52], (and, therefore, both parties to the exclusive agreement could theoretically be fined).

Some authors argue, however, that companies having a dominant position should be held to a higher standard [53], an argument which is probably coherent with the fact that, under E.U. Competition law, companies enjoying a dominant position have a "special responsibility" not to allow its conduct to impair competition in the market. For instance it also seems reasonable to anticipate that a network of exclusivity agreements signed by a company in a situation of super-dominance where network effects are virtually impossible to reverse will not be assessed in the same way by the antitrust authorities than other more easily reversible situations in terms of market foreclosure.

IV. Conclusions

Stakeholders have been dealing with exclusivities and E.U. antitrust under changing legal frameworks and more sophisticated economic theories. However, the fundamentals remain the same. The pro-efficient effects of exclusivities have been increasingly recognized by the antitrust authorities at E.U. and National level who have gradually added a limited number of new options in terms of territorial restrictions notably in scenarios where a new product or brand is launched.

Internet commerce is necessarily affecting some basic premises of the E.U. antitrust assessment of exclusivities such as the difficult accommodation of Internet commerce in the classic distinction between active and passive sales. In this light Internal market political imperatives and the wish to protect demand from more and different customers seem particularly important policy considerations.

Situations of super-dominance dramatically increase E.U. antitrust liability within the uncertain boundaries of a possible application of Articles 101 and/or 102 TFEU in particular when it can be argued that exclusivity agreements are used in situations where entry barriers seem insurmountable and monopolisation through market leveraging into adjacent markets seems credible.

As the national cases summaries included in this number of *e-Competitions* show, there is an appearance of heterogeneous application of antitrust policy on exclusivities across the E.U. Understandably this heterogeneity seems lower in the area of remedies in case an infringement was found. These remedies shall be relatively straightforward from a contractual point of view. The assessment of exclusivity cases is very much fact-based and ultimately call for a rule of reason decision where proportionality aspects are paramount that is why higher uniformity in the application seems difficult to achieve and might not even be desirable.

The contractual or *de facto* combinations of exclusivities with other *non-hard core* restrictions remain possible thereby offering some interesting commercial opportunities for the informed economic operator.

NOTES

[1] See Joined cases C-56 and C-58-64 *Etablissements Consten S.A.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community*, [1966] ECR, Page 00429 ("Consten and Grunding").

[2] C*ontinental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

[3] See European Commission Press release issued on 20 April 2010 "Antitrust: Commission adopts revised competition rules for distribution of goods and services", IP/10/445, Brussels, 20 April 2010.

[4] Compare, *e.g.*, the (i) Decision of the *Autorité de la Concurrence* on 11 January 2010, accepting the commitments offered by Apple and Orange to limit to 3 months any distribution exclusivities relating to current or future *iPhone* models in order to terminate infringement proceedings conducted under E.U. law; with the (ii) ruling of the Regional Court of Hamburg on 4 December 2007 in Case nº 315 O 923/07*iPhone*, where the Court considered compatible with both German and E.U. Competition law an agreement between the German mobile network operator *T-Mobile* and *Apple Inc.* for the launch of the *iPhone*. See Lila Ferchiche, *The French Competition Authority accepts the commitments to waive distribution exclusivity on mobile telephones («i-Phone» Apple - Orange*, 11 January 2010, e-Competitions, n° 30196 and Petra Linsmeier, Moritz Lichtenegger, *A German Court rules on the exclusive iPhone distribution agreements (Apple/T-Mobile)*, 4 December 2007, e-Competitions, n° 21242.

[5] NCAs and Courts have even taken up cases when the facts had been already taken into consideration by the Commission (*e.g.*, a Spanish court looked at an issue the Commission had already dealt with by dint of an Article 9 Commitments Decision in the ruling 477/2007 of the *Juzgado de lo Mercantil* on 29 July 2007, in Case *Carburantes Costa de la Luz v. Repsol*). See Aitor Montesa Lloreda, Angel Givaja Sanz, *A Spanish Court holds that it is not bound by an EC Commission decision under Art. 9 of EC Reg. 1/2003 (Carburantes Costa de la Luz v Repsol)*, 29 July 2007, e-Competitions n° 16060.

[6] A similar heterogeneity can be found in the domain of unfair trade law regarding the *Ryanair* "*screen-scraping*" saga of cases. *Ryanair* has faced challenges in several European countries regarding its singularity, which lies in its selling tickets to end users directly, without intermediaries. Compare the ruling of the Paris Court of First Instance on 9 April 2010 in Case nº 8/12802 *Ryanair / Opodo*, denying the airline the possibility of online travel agencies selling its tickets without intermediaries with, *e.g.*, the ruling of the Regional Court of Hamburg, on 28 May 2009, Az. 3 U 191/08, which ruled against *Vtours*, a travel agency which used screen-scrapping techniques allegedly to *Ryanair*'s displeasure. See Cédric Manara, *The Paris Court of first instance denies an airline company having an exclusive distribution model the right to prevent an online travel agency from selling its tickets (RyanAir/Opodo)*, 9 April 2010, e-Competitions n° 32656.

[7] To name but a few: (i) the principle of Supremacy of E.U. law; (ii) the issuance by the European Commission of detailed *Guidelines on Vertical Restraints*; (iii) the existence of the European Competition Network and the mechanisms of cooperation between competition authorities provided therein, (iv) the possibility for National Courts, to ask for a preliminary ruling from the Court of Justice of the European Union (see Article 267 TFEU) and (v) the provision, in Article 3(2) of *Council Regulation No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty*, Official Journal L 001, 4 January 2003, P. 0001 – 0025 that "*[…] the application of national competition law may not lead to the prohibition of*

agreements […] which may affect trade between Member States but which do not restrict competition within the meaning of Article [101(1) TFEU] of the Treaty, or which fulfil the conditions of [Article 101(3) TFEU] of the Treaty […]".

[8] See, *e.g.*, the example included by the Commission at para. 202 of its *Guidelines on Vertical Restraints*, which declares the exemption provided in Article 101(3) TFEU applicable to an exclusive supply agreement of a duration of 5 years entered into between a supplier with a market share of 35% and a buyer with a market share on both the upstream component market and the downstream final goods market of 40%.

[9] See, *e.g.*, the Guidelines on Vertical Restraints, which provide, at para. 194 in fine, that "[w]here a company is dominant on the downstream market, any obligation to supply the products only or mainly to the dominant buyer may easily have significant anti-competitive effects". The Guidelines on Vertical Restraints include a similar provision regarding single branding at para. 140 ("[f]or a dominant company, even a modest tied share may already lead to significant anti-competitive effects"). Finally, the Guidelines on Vertical Restraints provide, at para. 153, that "the market position of the supplier and its competitors is of major importance, as the loss of intra-brand competition can only be problematic if inter-brand competition is limited". See further the Ruling by the Hungarian Metropolitan Court of Appeal of 17 November 2010, Case nº2 KF.27.408/2010/5, *Kortex Mérköni Iroda Kft v Competition Authority* (as a result, as we will see below, of the Hungarian NCA using an arguably narrow market definition). See Márton Horányi, *The Hungarian Metropolitan Court of Appeal upholds an infringement decision of the NCA concerning an exclusive supply and purchasing arrangement and finds that the addressees of the decision have no standing to challenge immunity granted to another party (Kortex Mérnöki Iroda)*, 17 November 2010, e-Competitions n° 34794.

[10] *E.g.,* a Dutch Court of First Instance interpreted the Dutch equivalent to Article 101 TFEU in an arguably restrictive manner when declaring that an exclusive distribution agreement entered into between *Rotim*, a Dutch company importing, selling and distribution ballast materials for railways and *Basalt*, a company established in Germany which produced ballast materials constituted a restriction of competition *because of its object*, (although it was clear that the parties were small players in the market for ballast materials) presumably because of the long duration of the agreements (from 1983 to 2008, with an option for renewal), and declared the agreement void. According to the ruling, *Rotim* would have the exclusive right to sell basalt materials to the Dutch Railways Company. See Ruling of the Dutch Court of First Instance of Hertogenbosch on 30 June 2006, in case 140052 *Rotim v. Ballast* and Tristan Baumé, Katelijne Lafleur, *A Dutch Court of First Instance declares an exclusive distribution agreement on the market of ballast materials for the construction of railways void according to the Dutch Competition Act (Rotim/Ballast)*, 30 June 2006, e-Competitions n° 12437.

[11] See the *Guidelines on Vertical Restraints,* at paras. 162 and 167, which deal with the combination of exclusive distribution with exclusive sourcing. See further the Ruling by the Hungarian Metropolitan Court of Appeal of 17 November 2010, Case nº2 KF.27.408/2010/5 *Kortex Mérköni Iroda Kft v Competition Authority*, upholding an infringement decision of the Hungarian NCA regarding an agreement combining exclusive supply and single branding (as a result, as we will see below, of the Hungarian NCA using an arguably narrow market definition). Of course, if an exclusive agreement is combined with hard-core restraints, like resale price maintenance the authority will usually held it illegal. See, *e.g.*, the ruling of the Austrian Supreme Court of 15 July 2009, nº 16 Ok 6/09 *Press Distribution* and Florian Neumayr, Gerhard Fussenegger, *The Austrian Supreme Court confirms a decision of the Cartel Court whereby cross-boarder RPM between a German publisher and an Austrian press distributor infringes Art 81.1 EU therefore preventing the exception provided in national legislation - excluding ban of RPM in the book / magazine sector - to apply (Burda / Pressegroßvertrieb)*, 15 July 2009, e-Competitions n° 31016.

[12] G*uidelines on Vertical Restraints*, at para. 151. See, *e.g.*, Decision of the *Autorité de la Concurrence*10-D-01 (accepting commitments to waive distribution exclusivity on mobile telephones) but see Judgment of the German Regional Court of Hamburg of 4 December 2007 (regarding the same issue on the German market). In the words of Steven Salop: "*[…], efficiency benefits are not inherent in exclusives. Exclusives might instead reduce competition by destroying rival's efficient access to key inputs, make experimentation more difficult, and raise switching costs. Stated most simply, the firm may be purchasing market power as well as a channel of distribution, source of supply, or additional customer*" (see Salop, S. "Economic Analysis of Exclusionary Vertical Conduct: Where Chicago has Overshot the Mark", *in* Pitofsky, (ed.) *How the Chicago School Overshot the Mark. The Effect of Conservative Economic Analysis on U.S. Antitrust*, Oxford University Press, 2008, at p. 150).

[13] G*uidelines on Vertical Restraints*, at para. 75 and 105, see also, *e.g.*, Decision of the *Autorité de la Concurrence*, 11-D-08 (commitments in relation to exclusive agreement regarding multi-brand gift cards). See Charles Saumon, Iphigénie Fossati-Kotz, *The French Competition Authority accepts commitments in relation to exclusivity agreements in the multi-brand gift cards sector (Accentiv'Kadéos)*, 27 April 2011, e-Competitions, n° 36667 and Olivier Beddeleem, *The French Competition Authority imposes a duty to respect competition law in the multi-brand gift cards sector (Accentiv'Kadéos)*, 27 April 2011, e-Competitions, n° 37378.

[14] For instance, the Commission states that the combination of exclusive distribution and single branding may be considered pro-competitive as it increases the incentive for the exclusive distributor to focus its sales efforts on a particular brand (see *Guidelines on Vertical Restraints*, at para. 161).

[15] Guidelines on Vertical Restraints, at paras 102, 153 and 154. See also, *e.g.*, Decision of the *Autorité de la Concurrence*, 06-D-22, related to *NGK Spark Plugs France* practices in the plug market for two-wheel vehicles (regarding intra/interbrand competition). See Ombline Ancelin, Charles Saumon, *The French Competition Council holds anticompetitive an exclusive purchase clause in a selective distribution agreement (NGK Spark Plugs)*, 21 July 2006, e-Competitions, n° 12414, Juliette Goyer, Lauriane Lépine, *The French Competition Council fines an exclusivity purchase clause contained in a selective distribution agreement on the basis of both Art. 81.1 EC and French provisions (NGK Spark Plugs)*, 21 July 2006, e-Competitions, n° 12430, Marie Koehler de Montblanc, *Selective distribution : The Competition Council decides on the validity of national exclusive purchasing clauses (NGK Spark Plugs)*, 21 juillet 2006, e-Competitions, n° 27397 and David Sevy, *The French competition authority fines a spark plugs producer for exclusive dealing practices (NGK Spark Plugs)*, 21 July 2006, e-Competitions, n° 12431. Regarding the duration of the permitted exclusive agreement and market power of the supplier, see, *e.g.*, UK Office of Communications (Ofcom), 18 January 2006, *Own-initiative investigation into the price of making telephone calls to hospital patients, Patientline Limited et antitrust law*, CW/00844/06/05 (agreements of 10 to 30 years in a two sided market declared legal) compared with Decision of the *Autorité de la Concurrence*, 10-D-07,*Titres Cadeaux / Kadéos* (exclusive agreement by a dominant supplier of multi-store gift cards up to 5 years considered excessive). See Justin Coombs, *The UK telecommunications regulator closes an investigation under Art. 81 and 82 EC, and equivalent UK provisions, on alleged anticompetitive and abusive price of telephone services to hospital patients in spite of long duration exclusivity clause (Patientline, «Premier»)*, 18 January 2006, e-Competitions, n° 565and Joseph Vogel, *The French Competition Authority rules that an over-general exclusivity clause in favour of an undertaking in a dominant position prevents access to the market for other potential operators (Titre Cadeaux / Kadeos)*, 2 March 2010, e-Competitions, n° 30919.

[16] See Hovenkamp, H. *Federal Antitrust Policy*, (3d ed. 2005), at para. 10.9d. See further Klein, B., "Exclusive Dealing as Competition for Distribution On the Merits", 12 *Geo. Mason L. Rev.* 119 (2003).

[17] Furthermore, exclusivity may also minimize free-riding in cases where there are no manufacturer supplied investments : (i) free-riding on manufacturer paid-for promotion to sell rival products, and (ii) free-riding in the form of failing to supply the promotion paid for by the manufacturer altogether, even in the absence of

dealer switching (see, Klein, B. and Lerner, A.V., "The Expanded Economics of Free-Riding: How Exclusive Dealing Prevents Free-Riding and Creates Undivided Loyalty", 72 *Antitrust L.J.*473, at pp. 481-83 (2007)).

[18] See *Guidelines on Vertical Restraints*, at para. 107(i). The value of a brand as a predominant tool of conveying quality and other relevant information to the consumer and the efficiencies of combining common branding strategies with exclusive distribution are also emphasized by the Commission in its Technology Transfer Guidelines. See Commission Notice – Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements (*OJEU C 101, 27 April 2004, p. 2-42*), at para. 64.

[19] See *Guidelines on Vertical Restraints*, at para. 107(g). In addition, for every extra unit a distributor sells by lowering its resale price or by increasing its sales efforts, the supplier benefits if its wholesale price exceeds its marginal production costs. The Commission recognizes that there may be a positive externality bestowed on the supplier by such distributor's actions. See, *Guidelines on Vertical Restraints*, at para. 107(f).

[20] See *Guidelines on Vertical Restraints*, para. 107(h).

[21] For a critical view of the current state of the law see, *inter alia*, the Opinion of Advocate General Maduro Poiares, delivered on 23 May 2007 in Case C-438/05 *The International Transport Worker's Federation and the Finnish Seamen's Union v. Viking Line ABP*, at para. 43. See further Alfaro, J. Águila Real, Professor of Commercial Law, Universidad Autónoma de Madrid, *Presentation of CMS Albiñana & Suárez de Lezo*, 27 January 2011.

[22] As Jones and Sufrin indicate, this approach was conceptually difficult, given that the main-objective of any agreement, and in particular, exclusive agreements, is to bind the parties and to restrict their freedom of action (see Jones, A., and Sufrin, B., *EU Competition Law*, *Text, Cases and Materials*, Oxford, 2011, at p.646). See further the U.S. Supreme Court, in a ruling written by Justice Louis D. Brandeis, in the *Chicago Board of Trade* case, according to which "*[e]very agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates, and perhaps thereby promotes competition, or whether it is such as may suppress or even destroy competition*" (see *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918)).

[23] It should be highlighted, that even after the Commission's last reform, certain NCAs seem to still adopt this strict approach (see, *e.g.*, ruling by the Hungarian Metropolitan Court of Appeal of 17 November 2010, on Case nº2 KF.27.408/2010/5).

[24] See, *inter alia*, B.E. Hawk, "The American (Anti-Trust) Revolution: Lessons from the EEC" [1988],*ECLR*, 53. See also Korah, V., *An Introductory Guide to EC Competition Law and Practice*, Hart Publishing, 2007, at pp. 451 ff.

[25] Commission Regulation n° 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 L 336, 29 December 1999, p. 21-25*).

[26] See Commission Regulation 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 L 102, 23.4.2010, p. 1–7* ("Regulation 330/2010").

[27] See, *e.g.*, *Spring* [2000] OJ L195/49; *Whitbread* [1999] OJ l88/26, upheld on appeal Case T-131/99,*Shaw v. Commission* [2002] ECR II-2-23 and Bass [1999] OJ L186/1 upheld on appeal Case T-231/99,*Joynson v. Commission* [2002] ECR II-2085. See Paul Bridgeland, *The EU Court of First Instance upholds the Commission's decisions granting an individual exemption under Article 81(3) to the standard leases of two UK brewers (Whitbread and Bass)*, 21 March 2001, e-Competitions, n° 36954.

[28] See, *e.g.*, the Decision by the Romanian Competition Authority on 3 March 2009, Decision nº 12, SC*Cadbury Romania SA*, where the Romanian Competition Authority considered applicable the Romanian equivalent to Article 101(3) TFEU to an exclusive distribution agreement which did not provide absolute territorial protection but which was combined with a recommended maximum prices. See Alexandr Svetlicinii, *The Romanian Competition Authority grants an individual exemption for the exclusive distribution agreements concluded by the leading sugar products manufacturer with its distributors (Cadbury Romania)*, 3 March 2009, e-Competitions, n° 25772. See further the Decision by the Bulgarian Competition Commission on 11 July 2006, in case K3K-46/10.03.06 *GlaxoSmithKline*, where the Bulgarian NCA interpreted broadly the Bulgarian equivalent to Article 101(3) TFEU to an exclusive distribution agreement between *GlaxoSmithKline Ltd. and Agroengineering-90 Ltd*, where both parties of the agreement were the only participants in the relevant market, holding a share in the said market of 100% in their different capacities as a manufacturer and distributor. See Petya Aladzhova, *The Bulgarian Commission on Protection of Competition grants individual exemption of an exclusive distribution agreement (GlaxoSmithKline)*, 11 July 2006, e-Competitions, n° 34045.

[29] See, *e.g.*, Decision by the Romanian Competition Authority on 9 December 2008 in case nº 95 SC Kraft Foods Romania, S. A. applying the criteria provided for in the Guidelines on Vertical Restraints to declare certain exclusive distribution agreements entered into by Kraft Foods Romania compatible with the Romanian equivalent to Article 101(3) TFEU. See Alexandr Svetlicinii, *The Romanian Competition Authority grants an individual exemption for the exclusive distribution agreements concluded by the leading chocolate producer with its distributors (Kraft Foods Romania)*, 9 December 2008, e-Competitions, n° 25686.

[30] See Goyder, J., E.U. Distribution Law, Hart Publishing, 2011, at p. 232.

[31] See Guidelines on Vertical Restraints, at paras. 129 ff.

[32] See Guidelines on Vertical Restraints, at paras. 151 ff. The Commission indicates at para. 151 that "at the same time the distributor is usually limited in his active selling into other (exclusively allocated) territories".

[33] See Guidelines on Vertical Restraints, at paras. 168 ff. The Commission indicates at para. 168 that "at the same time, the distributor is usually limited in his active selling to other (exclusively allocated) groups of customers".

[34] See Guidelines on Vertical Restraints, at paras. 192 ff.

[35] See Guidelines on Vertical Restraints, at para. 130. Following the *Delimitis* case law (see Case C-234/89 *Delimitis/Henninger Bräu* [1991], p. I-935), the Commission has indicated that it will take into account the cumulative effects of single branding agreements entered into by other dealers (see Guidelines on Vertical Restraints, at para. 134).

[36] See Decision of the *Autorité de la Concurrence* on 27 April 2011, *relative a des pratiques mises en oeuvre par la société Accentiv Kadéos*, where the French Competition Authority accepted that the commitments offered by *Accentiv Kadéos* in relation to certain exclusivity agreements between it and its partner brands in the multi-brand gift cards sector (*Accentiv' Kadéos* accepted reducing the length of the agreements) ruled out the Authority's concern that these agreements might foreclose access to the markets for the acceptance and distribution of multi-brand gift cards. See further Decisions of the*Autorité de la Concurrence* on 9 December 2009, *Orange Caraïbe and France Telecom*, upheld on appeal by the Court of Appeal of Paris (*Cour d'appel de Paris*) on 23 September 2010, RG/2010/00163 *Orange Caraïbe, France Telecom / Digicel, Outremer Telecom* and on 30 September 2009 relative à des pratiques mises en oeuvre dans le secteur de la gestion et de la commercialisation des droits sportifs de la *Fédération française de football* (FFF). See European Competition Network, *The French Competition Authority fines incumbent telecom operator in overseas territories and applies EU case law on presumption of liability of parent companies for the first time (Orange Caribbean)*, 9 December 2009, e-Competitions, n° 33413 and Elise Provost, *A French Appeal Court rejects the applicability of Art. 101 and 102 TEU but upholds the findings that two telecom operators had abused their dominant positions in the telephony markets (Orange Caraïbe and France Telecom)*, 23 September 2010, e-Competitions, n° 33595. Other NCAs have also applied these principles. See the Decision of the Danish Competition Council of 26 October 2005, applying European law and granting clearance to certain agreements by Carlsberg and the gastronomic sector subject to commitments alleviating the exclusivity effects of the agreement and Gry Hoirup, *The Danish Competition Council clears a beer*

standard distribution agreements in the gastronomic sector subject to commitments alleviating the exclusivity effects of the agreement on the basis of Art. 81/82 EC (Carlsberg), 26 October 2005, e-Competitions, n° 314.

[37] See Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.2.2009, p. 7–20.

[38] See Ruling by the Bulgarian Supreme Administrative Court on 9 July 2009, Bulgarian Competition Authority v. Iosini Ltd. See Alexandr Svetlicinii, *The Bulgarian Supreme Administrative Court dismisses the charges of abuse of dominance launched against domestic tobacco producer (Iosini)*, 9 July 2009, e-Competitions, n° 28695. For an example of the analysis of single branding agreements in terms of foreclosure outside the E.U. see the Decision by the Serbian Commission for the Protection of Competition on 26 December 2008, nº 5/0-01-73/08/59 Serbia Broadband – Srpske Kablovske. See Dusan Popovic, *The Serbian Competition Authority finds abuse of a dominant position in the market of RTV direct-to-home distribution services (Serbia Broadband II)*, 26 December 2008, e-Competitions, n° 25890 and Alexandr Svetlicinii, *The Serbian Competition Authority finds abuse of dominant position on the market for TV content distribution via DTH technology (Serbia Broadband)*, 26 December 2008, e-Competitions, n° 25927.

[39] See Guidelines on Vertical Restraints, at para. 51.

[40] See, *e.g.*, the concerns regarding market foreclosure that the Hungarian NCA showed when declaring that certain exclusive distribution agreements regarding magazines fell within the scope of the Hungarian equivalent of Article 101(1) TFEU but could be exempted under the Hungarian equivalent to Article 101(3) TFEU (see Decision of the Council of the Competition office on 21 March 2006, in case Vj-28/2005/116, *Magazine Distribution Agreements*). See Gábor Fejes, Zoltan Marosi, *The Hungarian Competition Authority condemns factual resale price maintenance (Kemira)*, 21 March 2006, e-Competitions, n° 31686. See also the Decision by the *Autorité de la Concurrence* on 21 July 2006 nº 06-D-22, *relative à des pratiques mises en oeuvre par la société NGK Spark Plugs France sur le marché des bougies pour deux roues* where the Authority objected, *inter alia*, to the compatibility with Article 101 TFEU of certain clauses limiting cross-border trade included in an agreement entered into between *NGK Spark Plugs France*, one of the main producers of spark plugs for motorcycles in France, and its distributors. Finally, see the Decision by the UK Office of Fair Trading on 1 March 2006 in *London-Wide Newspaper Distribution*, Case CE/2479/03, accepting the binding commitments offered by the Associated Newspapers Limited ("*ANL*"), the publisher of the Daily Mail, Mail on Sunday, Ireland on Sunday and the Evening Standard Newspapers) and granting *ANL* exclusive distribution rights in the London underground and train stations for its free morning newspapers. See Alex Potter, Alison Jones, *The UK Office of Fair Trading accepts commitments offered by a free news paper alleviating its exclusive distribution rights in London underground and train stations (Metro - Associated Newspapers Ltd.)*, 1 March 2006, e-Competitions, n° 536. Finally, see the ruling of the Brussels Court of Appeal on 15 March 2006 Horas International v. Rexit S.p.A., Case RG 2002/AR/176. See Tarik Hennen, Alexandre Defossez, *The Brussels Court of Appeal awards damages for active sales breaching an exclusive distribution agreement (Horas International / Rexit)*, 15 March 2006, e-Competitions, n° 1386.

[41] See Guidelines on Vertical Restraints, at para. 61. In the words of the Commission's officials Brenning-Louko, Gurin, Peeperkorn and Viertiö, "[w]here substantial investments by a distributor are necessary in order to start up and / or develop a new market, any restrictions of (active and) passive sales by other distributors into such a territory or to such a customer group which are necessary for the distributor to recoup those investments generally fall outside the scope of Article 101(1) during the first two years that the distributor is selling the contract goods or services in that territory or that customer group." (see Magdalena Brenning-Louko, Andrei Gurin, Lucas Peeperkorn, Katja Viertiö, *The European Commission adopts new block exemption regulation and new guidelines on vertical agreements*, 20 April 2010, e-Competitions, n° 34857).

[42] See, *e.g.*, the ruling of the Regional Court of Hamburg on 4 December 2007 in Case nº 315 O 923/07*iPhone*, where the Court pointed out that there may be hardcore restrictions which are not appreciable in cases where the market position of the parties is weak, a position which was afterwards followed by the Spanish NCA in its decision on 3 December 2009 in case S/0105/08 *Corral de las Flamencas*. See Albert Pereda Miquel, María González Navarrete, *The Spanish Competition Authority closes a resale price maintenance case, after applying the de minimis rule (El Corral de las Flamencas)*, 3 December 2009, e-Competitions, n° 32027.

[43] See Guidelines on Vertical Restraints, at para. 192. The analysis of foreclosure features prominently in the 2011 U.S. case *Du Pont de Nemours* (see U.S. Court of Appeals for the 4th Circuit, *El du Pont de Nemours & Co. v. Kolon Industries, Inc.*, although it is an abuse of dominant position / monopolization case).

[44] See, *e.g.*, the Ruling by the Hungarian Metropolitan Court of Appeal of 17 November 2010, Case nº2 KF.27.408/2010/5, *Kortex Mérköni Iroda Kft v Competition Authority*.

[45] See, Commission staff working document: report on cross-border e-commerce in the EU, SEC(2009) 283 final, 5 March 2009.

[46] See, Digital Agenda for Europe: Communication from the Commission (26/08/2010), COM/2010/0245 f/2.

[47] As indicated above, "passive" sales are sales in response to an unsolicited order from customers in that territory or group. This is contrasted with restrictions on "active" sales, meaning active marketing, for example, by targeted advertising, customer visits or mail shots. According to E.U. Competition law, active sales can be restricted into territories or customer groups that have been exclusively allocated to other distributors or expressly reserved to the supplier itself whereas a total ban on passive sales is usually prohibited.

[48] Vertical Guidelines, at para 52.

[49] This argument was also recently confirmed in the *Pierre Fabre* Judgment (case C-439/09, *Pierre Fabre Dermo-Cosmétique v. Président de l'Autorité de la concurrence, Ministre de l'Économie, de l'Industrie et de l'Emploi*, judgment of 13 October 2011). See Joseph Vogel, *The European Court of Justice rules that absolute bans on Internet sales are prohibited (Pierre Fabre Dermo-Cosmetique)*, 13 October 2011, e-Competitions, n° 39725. See also cases *Yves Saint Laurent perfume* (Commission press release IP/01/713; requiring deletion of Internet resale restriction); *B&W Loudspeakers*(Commission press release IP/02/916; also requiring deletion of Internet resale restriction); and *Yamaha* (Case COMP/37.975, Commission decision of 16 July 2003); obligation to consult supplier before making Internet sales held illegal (at paras. 107-110). See Elodie Clerc, *The European Commission fines Japanese manufacturer of electronic musical instrumental for restrictions of trade and resale price maintenance in Europe (Yamaha)*, 16 July 2003, e-Competitions, n° 36907.

[50] Compare the CJEU's original approach, almost of per se illegality, to exclusivities entered into by dominant undertakings was (see, *e.g.*, Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114-73 *Suiker Unie v Commission* [1975] ECR 1663, and Case C-85/76, *Hoffman-La Roche and Co AG v. Commission*[1979] ECR 461, see further O' Donoghue, R. and Padilla, J., *The Law and Economics of Article 82 EC*, Hart Publishing, 2006, at p. 358) with the latest Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (*OJ C 45, 24.2.2009, p. 7–20*), which undertake an analysis of exclusivities in terms of a rule-of-reason analysis of foreclosure in its Section IV.A (paras. 32 ff).

[51] A view that seems to have the endorsement of some authors (see, *e.g.*, Alfaro, J., *The Question is not whether a 'more economic approach' is dead or alive. The Question is that it has already reached its limits*, unpublished). An exception should perhaps be made for those scenarios where exclusive agreements are used as a device to facilitate other and more serious anticompetitive agreements. But then the rules on horizontal agreements might arguably apply to such cases.

[52] See Ruling of the *Court d'appel de Paris* on 23 September 2010, RJ 2010/00163 *Orange Caraïbe, France Télecom/ Digiciel,Outremer Telecom*.

[53] See Calkins, S., "Wrong turns in exclusive dealing law" in Pitofsky, R., (ed.) *How the Chicago School Overshot the Mark. The Effect of Conservative Economic Analysis on U.S. Antitrust*, Oxford, 2008, at p. 165.