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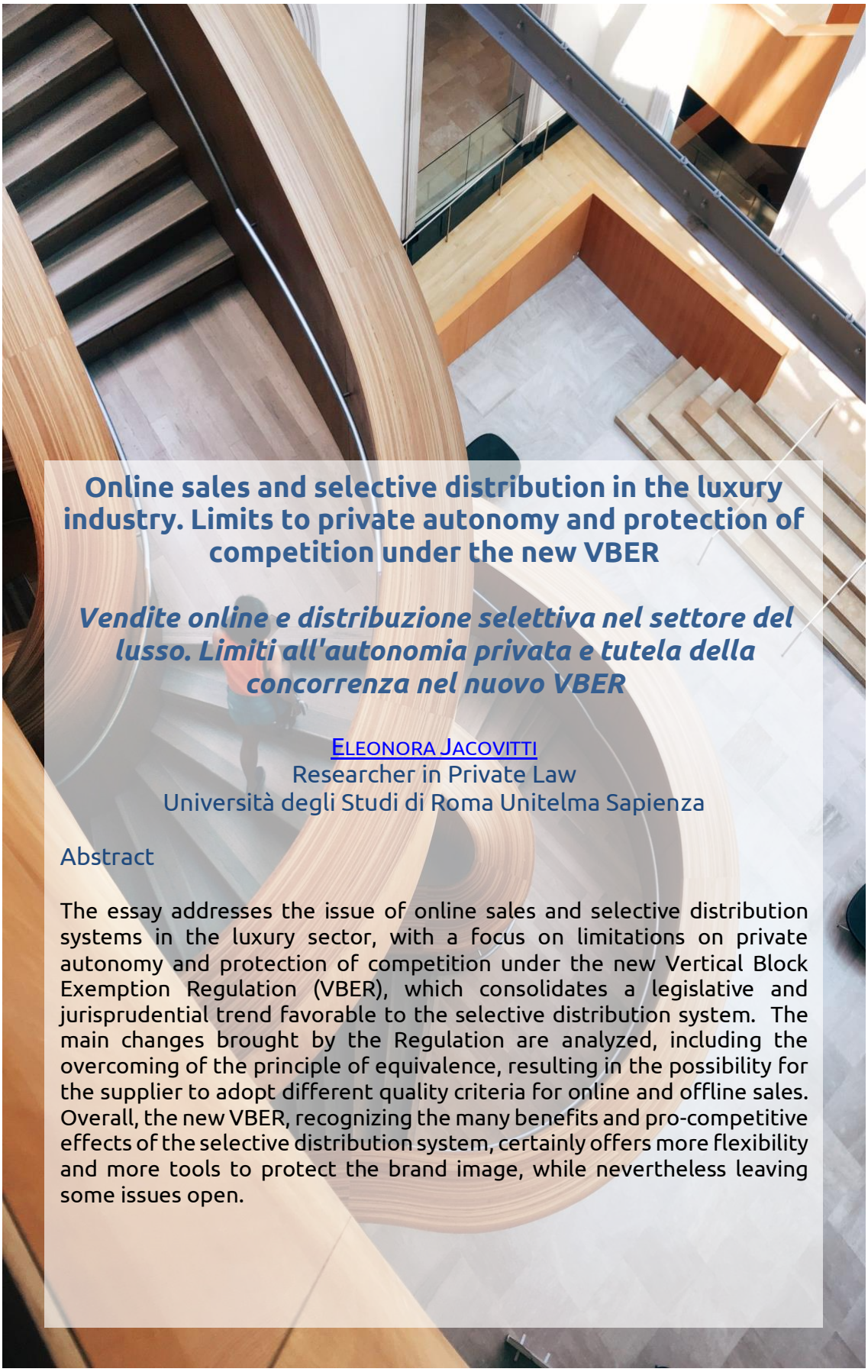

Online sales and selective distribution in the luxury industry. Limits to private autonomy and protection of competition under the new VBER

Vendite online e distribuzione selettiva nel settore del lusso. Limiti all'autonomia privata e tutela della concorrenza nel nuovo VBER

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Abstract

The essay addresses the issue of online sales and selective distribution systems in the luxury sector, with a focus on limitations on private autonomy and protection of competition under the new Vertical Block Exemption Regulation (VBER), which consolidates a legislative and jurisprudential trend favorable to the selective distribution system. The main changes brought by the Regulation are analyzed, including the overcoming of the principle of equivalence, resulting in the possibility for the supplier to adopt different quality criteria for online and offline sales. Overall, the new VBER, recognizing the many benefits and pro-competitive effects of the selective distribution system, certainly offers more flexibility and more tools to protect the brand image, while nevertheless leaving some issues open.

Abstract
Il saggio affronta il tema delle vendite online e dei sistemi di distribuzione selettiva nel settore del lusso, con particolare attenzione alle limitazioni dell'autonomia privata e alla protezione della concorrenza ai sensi del nuovo Regolamento di esenzione per categoria relativo agli accordi verticali (VBER), il quale consolida una tendenza legislativa e giurisprudenziale favorevole al sistema di distribuzione selettiva. Si analizzano le principali novità apportate dal Regolamento, tra cui il superamento del principio di equivalenza, con la conseguente possibilità per il fornitore di adottare criteri qualitativi diversi per le vendite online e offline. Nel complesso, il nuovo VBER, riconoscendo i numerosi benefici e gli effetti pro-competitivi del sistema di distribuzione selettiva, offre sicuramente maggiore flessibilità e più strumenti per proteggere l'immagine del marchio, pur lasciando aperte tuttavia alcune questioni.

Keywords: Online sales; Selective distribution systems; Luxury sector; Competition; VBER

Summary:

1. The importance of distribution in the luxury industry

In the luxury industry,[1] where the brand sells first and foremost values and belonging to an elite, customer involvement and loyalty must necessarily pass through a value-added sales experience.

In fact, the exclusivity of luxury goods does not only concern the object itself, but the way it is presented, advertised and sold. Although the first interaction between product and consumer occurs through the marketing process, the real meeting place is the store.

The point of sale is not simply the physical place where the purchase takes place, but a real "relational platform"[2] able to connect business and consumers. The location, the organization of space, furniture, lighting, sounds, smells, services, staff, are all elements that have a significant impact on customer perceptions and behavior.

[1] Briefly, it should be remembered that the luxury goods industry can refer to various product categories: fashion, jewelry and watchmaking, cosmetics, automotive, nautical and aeronautics, up to the world of food and wine. In each of these categories there is a plurality of brands that become part of luxury, but which are extremely different from each other, both in terms of price range and image. Think, for example, of Hermes and Michael Kors, which - it is clear - are aimed at different types of customers.
In this regard, different types of luxury have been distinguished. The most famous classification is the one that takes the name "Pyramid of Luxury", where the luxury market is divided into three macro sectors: accessible luxury, intermediate luxury and inaccessible luxury. This model was developed by D Allérès, *Luxe: stratégies, marketing* (2005).

[2] In these terms, L Pellegrini, *Luoghi dell'acquisto e relazione con il consumatore*, (2001) 3 Micro & Macro Marketing 386.

The store is therefore a stage where to interpret the brand and its values and where to make the customer participate in the representation, thus capturing the information necessary to keep the offer alive.[3]

Given these premises, it is evident how fundamental it is for luxury companies to properly choose their distribution network, both in physical and virtual dimensions.

2. The main distribution formats and the expansion of e-commerce

Undoubtedly, the most used format in the luxury industry is the single-brand store, which can be divided as follows: flagship store [4], pop up store (or temporary store) [5], self standing store[6] and shop in shop (or corner store).

As is well-known, the luxury goods industry also uses indirect channels of distribution, such as multi-brand store, [7] department store, [8] outlet store, concept store.[9]

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[3] L Pellegrini, *Luoghi dell'acquisto e relazione con il consumatore*, 388.

[4] An example is *Fendi*'s flagship store located in Rome, Palazzo Fendi. It occupies a space dedicated only to retail activities of about one thousand square meters which is also joined by a VIP Lounge, a boutique hotel and a restaurant on the top floors of the building with a panoramic terrace. The interiors are carefully designed in every detail; the entrance is characterized by a floor with concentric circles of precious marble inspired by that of St. Peter's and a wall composed of thousands of gilded metal nails in which the iconic Baguette are exposed.

[5] In particular, in the luxury industry, the purpose of the pop up store is not so much to sell products as to stimulate word of mouth to multiply the reach of the brand. So JF Klein, *et al.*, 'Linking pop-up brand stores to brand experience and word of mouth: The case of luxury retail' (2016) 69(12) Journal of Business Research, 5761.

Think, in particular, of the *Makers House* opened in 2017 in London by the British luxury brand *Burberry* for a week after the February fashion show. *Makers House* was a collaboration with the *Henry Moore Foundation*, with the intention of showing the iconic artist who inspired the new collection. In the space were exhibited some sculptures by Moore next to *Burberry* dresses. During the week there were also a series of live events and workshops, such as engraving, textile printing, life drawing and watercolor courses. The example is quoted by G Warnaby, C Shi, *Pop-up retailing: managerial and strategic perspectives* (2018), 6.

[6] In department stores or department stores dedicated to fashion or cosmetics, such as *La Rinascente* in Italy, there are several of these examples dedicated to the sale of a specific brand.

[7] The multi-brand store has some important features. In fact, the variety of brands this distribution model is able to offer prevents the final consumer from being hinged to a single brand, but rather allow it to build a style by mixing different garments; in addition, the independent multi-brand store can act as an incubator for little known brands or with an assortment that does not allow to meet the needs of single-brand distribution. So, R Cappellari, *Marketing of fashion and lifestyle products*, ch. 5, § 5.3, where it is also noted that one of the strengths of multi-brand retailers is the ability to offer the customer a real consulting service on how to choose your wardrobe (personal shopper). The Author mentions, in particular, Trunk Club, the company that belongs to the American department store chain Nordstrom, which offers a very special service taking advantage of the opportunities of the Web. Precisely, the customer fills in a short online questionnaire that is analyzed not by an algorithm but (the company specifies) by a dedicated stylist who is a real person. The stylist makes a first selection of garments consistent with the client's style and invites him to view the first proposal. He can analyze them in a dedicated area of the website and will then receive at home a package with all the proposals that he has not discarded; at that point, he will have ten days to decide what to return (without cost) and will pay only the garments he decides to keep. Obviously the advice will improve from shipment to shipment as the stylist will get to know the customer and his tastes.

[8] Among the most famous, there are *La Rinascente* and *Coin* in Italy, *Harrods* in London, *Galerie Lafayette* in Paris, *Bloomingdales* and *Macy's* in the United States.

[9] It is a distribution format that can be used by both single-brand and multi-brand stores. With regard to the former, think of the *Ralph Lauren* stores, which look like real homes with their wooden and hand-carved furniture, where an Old England atmosphere is reconstructed. The aim is to wrap the consumer in a relaxed and familiar atmosphere, in order to make their shopping experience memorable.

An example, instead, of multi-brand is constituted, in Italy, by *10 Corso Como*. The store, managed by Carla Sozzani, was born in 1990 in Milan first as a photo-gallery, then became a store, bookshop, restaurant and

The distribution format that has experienced the highest growth rate in recent years is undoubtedly represented by the Web, which has had a particular acceleration due to the Covid -19 pandemic.

It should be noted that the luxury goods industry has taken some time to approach e-commerce; just think of *Celine* and *Chanel*, who only launched online sales in 2018. This delay is certainly due to the reticence of the most prestigious brands to bring their name online, for fear of compromising their image of exclusivity. This is why it is very important for a luxury brand to take care of its online channel in detail, so as not to disappoint the consumer's expectations.

In general, the online distribution channel represents for companies an integrative and complementary channel to the traditional one, but it should be highlighted that it can also be a real business model (think of *Zalando* and *Ynap*).

There are many distribution models\channels over the Web.

First of all, it is possibile to conduct sales through the brand's website; in fact, for many fashion brands their e-commerce site is the biggest store in terms of sales. The single-brand online channel guarantees the company full control over the image and the way the product is sold; obviously, it also poses various logistical challenges related to both the shipment of goods and the receipt and management of returns.

Online sales can also be made through multi-brand channels. In this case, two types of subjects can be distinguished: brick & mortar retailers, which flank traditional sales with a website, and pure digital market players. A problem, to underscore, of multi-brand online channels concerns the control of the conditions of sale of their products, which can often cause conflicts within the distribution channel.[10] We will return to this topic later.

It should be noted that physical stores and virtual stores are no longer completely separate and alternative realities, but closely related. Suffice it to say that by now, before buying a high-end product in-store, most customers look for information on the internet; likewise, the online sale of luxury products is most often anticipated by a direct in-store survey.

The new retail trend is therefore no longer represented by multi-channel management, but by omnichannel management, defined as «the synergistic management of the numerous available channels and customer touchpoints, so as to optimize the customer experience and performance on channels».[11]

With particular regard to the luxury goods industry, notice that today the buyer follows a mixed online/offline path;[12] some studies show that luxury

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bar. Here customers can go from the space dedicated to clothes, to the bookstore, to the area dedicated to free exhibitions, and then relax for a coffee or enjoy the terrace, immersing themselves in a world entirely dedicated to fashion and design.

[10] R Cappellari, *Marketing of fashion and lifestyle products* (2016), ch. 5, § 5.5. Another interesting phenomenon, mentioned by the author, is that of event or flash sales, which exploded after the great crisis of 2008 that had flooded the market of unsold products of almost all the most famous brands. These are sales of products at discounted prices generally aimed only at members and, above all, with very short duration to stimulate impulse purchases linked to the fact that they are offers to be seized on the fly. The leaders in this market are *Vente-Privèe*, *Privalia*, *Gilt* and *Groupon*.

[11] In these terms, PC Verhoef, PK Kannan, JJ Inman, 'From multi-channel reatiling to omni-channel retailing: introduction to the special issue of multi-channel retailing' (2005) 91(2) Journal of Retailing, 176.

[12] <https://www.mckinsey.com/~/media/mckinsey/industries/retail/our%20insights/luxury%20in%20the%20age%20of%20digital%20darwinism/the-age-of-digital-darwinism.ashx>.

customers increasingly purchase products via the ROPO approach (Research Online Purchase Offline) and want seamless omnichannel experiences, easily switching between physical, digital and virtual stores. Luxury brands are already investing in the creation of experiential customer-centric omnichannel stores that offer immersive customer experiences, supported by disruptive technologies such as video shopping, Extended Reality, IOT, and AI. By doing so, luxury brands can make their customers' experiences more interactive, exciting, and personal while establishing customer loyalty and increasing brand equity long after a product is purchased.[13]

3. Distribution agreements. Limits to private autonomy and protection of competition

As we have seen, the forms in which the distribution of a product or a service can be organized are various, although they substantially fall into two categories: direct and indirect distribution.

In business practice, companies adopt complex contractual agreements, inspired by the aim of achieving closer economic integration between suppliers and retailers.[14] These agreements, including the figure of the sales concession, franchising, joint ventures, etc., include clauses that allow the supplier a penetrating interference in the decision-making sphere of its retailers and a unified coordination of the distribution network. At the same time, in return for the restrictions on decision-making freedom, retailers are granted privileged positions, for example resale exclusivity for a certain area.[15]

Distribution contracts can hardly be considered as falling in a single category; indeed, multiple contractual figures can be identified according to the degree of integration of the distributor in the system set up by the

[13] So, the study "Global Power of Luxury Goods 2023" conducted by Deloitte and available at the following link <https://www2.deloitte.com/content/dam/Deloitte/at/Documents/presse/at-deloitte-global-powers-of-luxury-goods-2023.pdf>. The report also points out that the "store of the future" will have to be not just digital, but also sustainable. One of the main challenges for luxury brands will be the creation of the Unified Commerce Augmented Store, which synthesizes customers' expectations of an omnichannel experience and the need for brands to have eco-sustainable and efficient stores.
About fidelity in the omni-channel environment, see C Ziliani, M Ieva, 'Loyalty in the omnichannel environment', in C Ziliani, M Ieva, *Loyalty Management: From Loyalty Programs to Omnichannel Customer Experiences* (2019), 183 ff.

[14] The bibliography on distribution contracts is particularly extensive. The phenomenon has been analyzed both from a legal and economic point of view.
With regard to the legal one, see the contributions of G Santini, *Il commercio* (1979); G Santini, *Commercio* (I, *Disciplina privatistica*), in *Enc. Giur. Treccani*, VII, Roma, 1988; R Pardolesi, *I contratti di distribuzione* (1979); R Pardolesi, *Contratti di distribuzione*, in *Enc. Giur. Treccani*, Roma, 1988, 1 ff.; A Di Meglio, 'Contratti di distribuzione: profili di diritto della concorrenza', in R Clarizia and F Marchetti (eds), *I contratti di distribuzione*, 703 ff.; A Pappalardo, *Il diritto comunitario della concorrenza* (2007); M Imbrenda, 'I contratti di distribuzione' in A Catricalà and E Gabrielli (eds), *I contratti della concorrenza*, *Trattato dei contratti*, directed by P Rescigno and E Gabrielli (2011); V Korah, D O' Sullivan, *Distribution agreements under the EC Competition Rules* (2002); J Goider, *Eu Distribution Law* (2011); VV.AA., 'I nuovi contratti nella prassi civile e commerciale', in P Cendon (ed.) *Il diritto privato nella giurisprudenza*, vol. XVI, (*Distribuzione*, 2004); M Bianchi, *Contratti internazionali di distribuzione*, Milano, 2019; R Clarizia, F. Marchetti (eds.), *I contratti di distribuzione*, (2020).

[15] For a report on the most used contracts in international practice, see R Pravisano, 'I contratti di distribuzione internazionale', in R Clarizia and F Marchetti (eds.), *I contratti di distribuzione*, p. II, 371 ff.

supplier.[16]

In Italy, distribution contracts are not subject to express legislative regulation. The gap is filled by the supplementary action of jurisprudence, which applies the legal provisions provided for some typical contracts, such as supply and mandate contracts.

Without going deep into the examination of the different contractual figures, the focus will be on the limits that private autonomy can meet, with particular regard to competition law.[17]

In that regard, it should be noted that in distribution contracts there are often found some restrictions that could be anticompetitive, such as: i) limitation to supply between distributors and resale to end users; ii) selective distribution systems and predatory practices; iii) resale price maintenance; iv) practices that tend to condition free distribution through the use of technology, including computer technology, and using a dominant position. These practices are constantly monitored by internal and community administrative and judicial bodies, as they are detrimental to the limits of private autonomy, free trade and competition.[18]

It follows that the theme of distribution is strongly connected with that of collusive practices between economic subjects that violate the rules of competition. To explore the topic further, it is necessary at this point to analyse the regulatory framework.

4. The european regulatory framework for restrictive agreements

Since distribution agreements realise a form of vertical integration of the activities of two legally distinct undertakings (supplier and distributor), restrictions related to these contracts may constitute vertical restraints, who fall under the prohibition of Article 101 (1) of the Treaty on the Functioning of the European Union (TFEU). Vertical agreements are certainly treated more favourably than horizontal agreements because they are considered to increase efficiency by generating pro-competitive effects.

As is well-know, Article 101 (3) exempts form the prohibition some restrictive agreements that may generate objective economic benefits that outweigh the negative effects of the restriction of competition.[19]

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[16] Part of the doctrine has attempted to create a unitary legal category, identifying common elements that characterize the different agreements; so, R Pardolesi, *Contratti di distribuzione* (n 14), 5 ff. For other authors, instead, the differentiations between the seen figures are such to not allow a *reductio ad unitatem*; see G Santini, *Commercio*, 2.

[17] About this topic, see G Olivieri, A. Zoppini (a cura di), *Contratto e antitrust*, (2008). See also N Irti, *L'ordine giuridico del mercato* (1998) 100, who observes that economic initiative is measured and ordered by competition law.

[18] A Di Meglio, *Contratti di distribuzione: profili di diritto della concorrenza*, 704.

[19] To satisfy Article 101(3), an agreement must satisfy four cumulative conditions: these conditions must be present cumulatively and are to be considered exhaustive.
Two of the conditions are positive and other two are negative:
a) the agreement must contribute «to improving the production or distribution of goods" or "to promoting technical or economic progress»;
b) in order to benefit from the exemption, the agreements must also allow «consumers a fair share of the resulting benefit»;

Over the year, the European Commission's approach to vertical restraints evolved. Initially, it was historically based on a broad and relatively strict interpretation of Article 101(1) TFEU, but the Commission often failed to recognise the potential pro-competitive effects of vertical restraints on inter-brand competition. It should be noted that this approach should be viewed in the economic context in which EU competition law developed during the 1960s and 1970s, when national markets were very much partitioned.

In the late 1990s, the Commission undertook a comprehensive review of its policy on vertical restraints. The final result of this review was the adoption of a single block exemption applying to all vertical arrangements with Reg. No 2790/1999. [20] The regulatory framework was based on the principle that restraints contained in vertical agreements were likely to have an anticompetitive effect when implemented by companies directing market power.

Among the major innovations was the introduction of market shares as thresholds for the benefit of the agreement's exemption; the exemption operated automatically where the supplier's market share did not exceed 30% of the relevant market in which it sold goods or services covered by the agreement. If the agreement exceeded the mentioned threshold, there was no presumtion of illegality, which could still benefit, albeit not automatically, from an individual exemption.

From the benefit remained in any case excluded, regardless of market share, agreements with so-called hardcore restrictions, considered particularly harmful to competition.[21]

Moreover, for some types of clauses, exemption was conditional on compliance with specific requirements, as in the case of non-compete agreements, which were exempt only if they were agreed upon with a maximum duration limit of five years.

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c) the agreements must avoid to «impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives»;
b) the agreements must avoid to «afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question».
It should be noted that, if at one time, in order to benefit from individual exemptions, companies had to notify agreements to the Commission in advance in order to request the authorization, with the reform implemented by Reg. 1/2003 the effectiveness of the exemptions has become direct[19]: an agreement that supplements the conditions of Article 101 (3), is automatically valid *ab origine* without the need for prior notification to the Commission. If the national antitrust authorities or the Commission itself request information on the agreement, it will be the task of the company itself to demonstrate the applicability of the exemptions provided by the third paragraph.

[20] Commission Regulation 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, now outdated from the following Reg. 330/2010, is available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31999R2790&from=IT>.

[21] These hardcore restrictions form a closed list which includes: resale price maintenance (the setting of a minimum resale price), prohibition of active and passive sales (market sharing), combination of selective distribution and prohibition of active or passive sales, restrictions on cross-supplies between selective distributors and the restriction agreed between a component supplier and a buyer incorporating such components of the supplier's ability to sell such components as spare parts to end users, repairers or other service providers not entrusted by the buyer with the repair or maintenance of its products.
For hardcore restrictions the general presumption is reversed: even if none of the parties enjoys market power, the agreement is presumed to fall under Article 101(1) TFEU and does not fulfil the conditions of Article 101(3) TFEU. In these circumstances it is presumed that the restriction is illegal, but the parties have the possibility to request a legal exemption in individual cases.

The subsequent Vertical Block Exemption Regulation (so-called VBER) – Reg. No 330/10[22] – has substantially maintained the fundamental contents of the previous legislation, both with regard to the forecast of market shares equal to 30% for the purposes of exemption, and with regard to conduct considered hardcore (and, according to the new legislation, still black list) and those clauses conditional on the existence of specific requirements (such as non-compete clauses). Even under these rules, there was no presumption of illegality in relation to those agreements - not covered by the regulation - that exceed the 30% thresholds, which could benefit from an individual exemption based on an analysis of the concrete dynamics of the market and the effects produced on it.

One of the main novelties concerned the extension of the percentage threshold requirement also to the buyer counterparty, and no longer only to the supplier as provided by the previous regulation. This change responded to the need to take due account of the increased market power of buyers, in particular in the consumer goods distribution sector, where in recent years there has been a significant expansion of large purchasing groups in organized distribution and the consequent trend towards a more concentrated structure of retail distribution markets.[23]

Another novelty concerned the discipline of online sales. It should be noted that Reg. No 330/2010 (like its predecessor, but at a time when the phenomenon was in its infancy), was not expressed in terms of "online sales", merely regulating active and passive sales. These were the Guidelines of the Commission that, in commenting on the above mentioned discipline,[24] paid particular attention to the use of the Internet by dealers.[25]

The main principle under Reg. No 330/2010 was that the prohibition of online sales constituted a hardcore restriction of competition as it was a passive sales restriction. However, the VBER exempted, under specific circumstances, the online sales restrictions on active sales only.[26]

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[22] Commission Regulation 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, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010R0330&from=IT>. The regulation came into force on June 1, 2010 and will expire on May 31, 2022.

[23] See G Bruzzone, A Saija, 'Le regole del 2010 sugli accordi verticali: approccio economico e utilizzo delle presunzioni giuridiche' (2010) 2 Contratto Impresa Europa, 638.

[24] In particular, the exception set forth in Article 4 (b), which provides that the exemption does not apply to vertical agreements which, directly or indirectly, in isolation or in conjunction with other factors under the control of the parties, have as their object «(b) the restriction of the territory into which, or of the customers to whom, a buyer party to the agreement, without prejudice to a restriction on its place of establishment, may sell the contract goods or services, except:

(i) the restriction of active sales into the exclusive territory or to an exclusive customer group reserved to the supplier or allocated by the supplier to another buyer, where such a restriction does not limit sales by the customers of the buyer,

(ii) the restriction of sales to end users by a buyer operating at the wholesale level of trade,

(iii) the 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, and

(iv) the restriction of the buyer's ability to sell components, supplied for the purposes of incorporation, to customers who would use them to manufacture the same type of goods as those produced by the supplier».

[25] Specifically, in paragraph 51. Guidelines on Vertical Restraints are available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52010SC0411&from=EN>.

[26] Internet sales must be considered passive sales when they consist in the creation of a site that can be consulted by users, through which it is possible to make reservations; instead, they are included among

The need to adapt the regulation on vertical agreements to recent technological developments and to overcome criteria that were still too tied to territoriality – evidently anachronistic in the age of the Internet – led the European Commission to adopt a new regulation. So, on 10 May 2022, it was published the new VBER (Reg. No 720/2022) and new Vertical Guidelines, which entered into force on 1 June 2022.[27] The new legislation will be valid for 12 years with an evaluation report after eight years.

The new regulation, in continuity with its predecessor, confirms the presumption of legality for vertical agreements entered into between companies with market shares below 30% (so-called safe harbour), provided, however, that they do not contain hardcore restrictions.[28]

Contrary to the old VBER, which did not explicitly mention online sales, the new VBER introduces a new category of defined hardcore restrictions with regard to online sales. In particular, Article 4(e) identifies as a hardcore restriction any vertical agreement that, directly or indirectly, has as its object the prevention of the effective use of the internet by the buyer or its customers to sell the contract goods or services, as it restricts the territory into which or the customers to whom the contract goods or services may be sold.

The main novelties concerning online sales and related restrictions will be discussed in more detail below.

5. Selective distribution agreements in the antitrust regulatory environment

In paragraph 3 we mentioned selective distribution among the typical restrictions related to distribution agreements.

Luxury brands, always mindful about their image, often use this kind of distribution to sell their products. It is, indeed, the most-used distribution technique for perfumes, cosmetics, leather accessories or even ready-to-wear.

Reg. No 720/2022 provides a definition of selective distribution, stating in Article 1(a) that it is «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

active sales when they also include direct contact with the consumer through targeted promotional messages. An example, in this sense, is online advertising specifically addressed to certain customers (for example, through the use of banners showing a territorial link on third-party websites, or through the payment of a fee to a search engine or an online advertising provider in order to present advertisements specifically to users located in a particular territory).

[27] Commission Regulation No 720/2022 of 10 May April 2022 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, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022R0720>.

[28] For a comment on the new rules, see B Rohrßen, *VBER 2022: EU Competition Law forVertical Agreements* (2023); P Manzini, 'Le restrizioni verticali della concorrenza nel nuovo VBER' (2022) Dir. comm. int., 555 ff; O Heinisch, M Hofmann, 'European Union: Updated Rules on Vertical Agreements', in GlobalCompetition Review,<https://globalcompetitionreview.com/review/the-european-middle-east-and-african-antitrustreview/2023/article/european-union-updated-rules-vertical-agreements>; P Gelato, S Vergano, 'Prime note a margine del Reg. UE 720/2022 e riflessi in materia di distribuzione selettiva', (2022) 2 Riv. dir. ind., 90; C Garilli, 'La disciplina antitrust delle intese verticali: un primo commento al nuovo Regolamento di esenzione per categoria (VBER)' (2024) 1 Nuove leg. civ. comm. 91.

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 is therefore a type of vertical restraint of competition which, however, is exempted from the prohibition under Article 101 TFEU, if the conditions set out in Reg. No 720/2022 are met.

The three main reasons why such a system is normally chosen are essentially the following:

- prevent free riding by other retailers or distributors: if a retailer invests in its premises and training to provide improved services to customers in order to promote the supplier's products and brand image, there is a risk that discounted retailers who have not made such investments may "ride freely" on such investments. It may therefore occur that customers first visit a premium retailer to benefit from the high quality of service offered, and then make their purchase at a discounted retailer (or online) who, by not providing such services, charges lower prices. This would result in a shift to discount retailers with a lower level of service and a less attractive retail experience, which would also harm the brand's unique image;

- protect the brand image: a luxurious environment and a sense of exclusivity enhance the image of certain products, thus promoting the brands stored in that environment;

- create incentives for retailers: retailers are often primarily interested in competing on price to attract more customers through lower prices; suppliers, on the other hand, may have different incentives, such as competing on customer service and experience to attract new customers and improve their brand image. From a supplier's point of view, it may be necessary to impose quality standards to achieve these goals.[29]

From an operational point of view, selective distribution agreements, as well as exclusive distribution agreements, restrict the number of authorized distributors on the one hand, and resale opportunities on the other.

The difference between these two kinds of distribution - as the Commission specifies in the Guidelines – lies in the nature of the protection granted to the distributor: in an exclusive distribution system, the distributor is protected against active selling from outside its exclusive territory, whereas in a selective distribution system, the distributor is protected against active and passive sales by unauthorised distributors.[30]

The possible effects of a selective distribution system on competition are a reduction of intra-brand competition, foreclosure of the market to certain types of distributors, a weakening of competition and a facilitation of collusion between suppliers or buyers.[31]

With regard to the objective requirements that may allow to adopt a selective distribution system, within the Guidelines, the Commission specifies that «Purely qualitative selective distribution may fall outside the scope of Article 101(1) of the Treaty provided that the three conditions laid down by the

[29] *Ashurst Selective Distribution Quickguide*, available at the following link <https://www.ashurst.com/en/news-and-insights/legal-updates/quickguide---selective-distribution/>.
[30] Paragraph 145.
[31] Paragraph 146.

Court of Justice of the European Union in the *Metro* judgment ('Metro criteria')[32] are fulfilled. This is because, if these criteria are fulfilled, it can be assumed that the restriction of intrabrand competition associated with selective distribution is offset by an improvement in inter-brand quality competition».[33]

The first condition is that the nature of the product in question must necessitate a selective distribution system, in the sense that such a system must constitute a legitimate requirement, having regard to the nature of the product concerned, to preserve its quality and ensure its proper use. Secondly, resellers must be chosen on the basis of objective criteria of a qualitative nature which are laid down uniformly for all and made available to all potential resellers and are not applied in a discriminatory manner. Thirdly, the criteria laid down must not go beyond what is necessary.

With reference to the type of products for which the use of a selective system may be justified, Reg. No 720/2022 makes no mention of this; the Guidelines of the Commission provide some indications in this regard, stating that: «For instance, the use of selective distribution may be legitimate for *high-quality or high-technology products* or for *luxury goods*. The quality of such goods may result not only from their material characteristics, but also from the aura of luxury surrounding them».[34]

Looking at the cases submitted at the Commission and the European Court of Justice, it is noted that selective distribution systems have been allowed for a very wide range of products: perfumes, [35] personal computers, [36] newspapers,[37] cars,[38] jewelry,[39] dental supplies including artificial teeth.[40]

Selective distribution is considered an efficient distribution agreement, in the case of machines or computers, because the quality of the auxiliary technical services clearly influences consumers' decisions; in the case of luxury goods (perfumes, jewellery, etc.), because suppliers need potential buyers to associate the right image with their products because the brand image is an intrinsic feature of the product. Therefore, suppliers need to ensure that the retail store provides a shopping experience consistent with the brand and reputation of the product.[41]

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[32] C-26/76, *Metro v Commission*, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61976CJ0026&from=EN>.

[33] Paragraph 148. Case C-31/80, *L'Oréal v PVBA*, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61980CJ0031&from=IT>; C-26/76, *Metro v Commission*, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61976CJ0026&from=EN>.

[34] Paragraph 149.

[35] *L'Oréal*.

[36] *IBM*, 84/233/EEC: Commission Decision of 18 april 1984, OJ L118/24, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31984D0233&from=EN>.

[37] Case C-243/83, *Binon v Agence et Messageries de la Presse*, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61983CJ0243&from=IT>.

[38] *BMW*, 78/155/EEC: Commission Decision of 23 december 1977, OJ L29/1, available at <https://eur-lex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:31978D0155&from=EN>.

[39] *Murat*, 83/610/EEC: Commission Decision of 5 december 1983, OJ L348/20, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31983D0610&from=GA>.

[40] *Ivoclar*, 85/559/EEC: Commission Decision of 27 november 1985, OJ L369/1, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31985D0559&from=EN>.

[41] In these terms P Buccirossi, 'Vertical restraints on e-commerce and selective distribution' (2015) 11(3), Journal of Competition Law & Economics, 762.

It should be noted that the criteria used by the supplier to select distributors may be qualitative or quantitative, or both. Quantitative criteria limit the number of distributors directly by, for instance, imposing a fixed number of distributors. Qualitative criteria limit the number of distributors indirectly, by imposing conditions that cannot be met by all distributors, for instance, relating to the product range to be sold, the training of sales personnel, the service to be provided at the point of sale or the advertising and presentation of the products. Qualitative criteria may refer also to the achievement of sustainability objectives, such as climate change, protection of the environment or limiting the use of natural resources.[42]

Irrespective of whether they fulfil the Metro criteria, qualitative and/or quantitative selective distribution agreements can benefit from the exemption provided by Article 2(1) of the Regulation, provided that the market shares of both the supplier and the buyer do not exceed 30% and the agreement does not contain any hardcore restrictions.[43]

6. Online sales and selective distribution under the new VBER

One of the issues that arise with the use and expansion of the e-commerce channel, concerns the delicate relationship between internet sales and the needs of the selective distribution. With particular regard to luxury goods, if e-commerce, on the one hand, is a very useful tool, on the other hand, if not controlled, can damage the image of the brand.

It is, therefore, fundamental to ensure uniformity of image in the two contexts, physical and virtual; but it is necessary to understand the limits within which it is possible to introduce restrictions to e-commerce when it does not comply with the rules and standards of a selective distribution system, without violating antitrust regulations.

The typical restrictions on online sales that are used in selective distribution systems are substantially: the imposition of quality standards for the website where the products are sold; the limitation of the possibility of online sales only to retailers who have one or more brick and mortar shops, sometimes also demanding a minimum turnover in these shops or setting a minimum percentage of offline sales or a maximum percentage of online sales; charging different wholesale prices for products sold online and offline; restricting the use of third-party platforms such as online auction platforms; limiting the advertising that retailers may do and the territories or group of customers that may be targeted; prohibiting designated retailers from selling contractual products online.[44]

From an overall examination of the new VBER and the Guidelines, the Commission shows a clear trend in favour of selective distribution, in line with a path, especially jurisprudential, that is now more than ten years old. Emphasis has thus been placed on a market trend that allows an effective and capillary

[42] Paragraph 144.
[43] Paragraph 151.
[44] In these terms P Buccirossi, 'Vertical restraints on e-commerce and selective distribution' (2015) 11(3), Journal of Competition Law & Economics, 763.

control of the distribution circuit, with the possibility of maintaining high quality standards intact, of which consumers are the ultimate beneficiaries.[45]

Firstly, in view of the increased role of the digital economy and online platforms, the so-called *principle of equivalence*, under which the selective criteria adopted by the supplier had to be the same for the traditional distribution channel, for websites and platforms, has been definitively overcome. The New VBER - recognising the inherent differences of these channels - instead allows for the possibility of providing different qualitative criteria for online and offline sales. For example - because of the different needs of consumers purchasing on the Internet – a supplier may legitimately set more stringent criteria for e-tailers by e-tailers by requiring them to adopt more secure payment systems or payment systems or particularly effective after-sales help desk services.

The new VBER has a less rigid approach also with regard to the application of different prices, depending on the chosen sales channels. What was previously considered to be a hardcore restriction, is now acceptable to the extent that the different prices aim at incentivising or regarding a certain level of investment made online and offline and reflect the costs incurred.[46]

It must be noted that the new framework specifies that qualitative standards may be imposed on online distributors irrespective of the distribution system used, but it is rather clear that this requirement essentially concerns the case of selective distribution, to which the Guidelines seem to make pre-eminent reference, assuming, for example, the imposition of "requirements aimed at ensuring the quality or a particular aspect of the buyer's shop" (§208(a)); "requirements concerning the display of the contract goods or services in the online shop" (§208(b)); "an obligation to operate one or more non-virtual shops or showrooms, e.g. as a condition for membership of the supplier's selective distribution system" (§208(d)); an obligation to sell a certain quantity of goods or services offline" (§208(d)).[47]

Also worthy of note is the possibility provided by the new VBER of including selective requirements related to sustainability and environmental protection. The Guidelines, in paragraph 144, enumerate some possible requirements: "suppliers could require retailers to provide charging or recycling facilities at their points of sale or to ensure that goods are delivered by sustainable means, such as transport bicycles instead of motor vehicles".

7. A special focus on third-party platform bans

In particular, one of all the restrictions often adopted in order to guarantee the quality of products and to safeguard the reputation of brands are the third-party platform bans. [48] According to the new VBER Guidelines, vertical

[45] So, P Gelato, S Vergano, 'Prime note a margine del Reg. UE 720/2022 e riflessi in materia di distribuzione selettiva' (n 28) 90.
[46] Paragraph 209.
[47] So, C Garilli, 'La disciplina antitrust delle intese verticali' (n 28), 120.
[48] For an interesting comparative report on the application of competition law to online sales platforms, see B Kilpatrick, P Kobel, P Këllezi (eds.), *Antitrust Analysis of Online Sales Platforms & Copyright Limitations and Exceptions* (2018).

agreements which restrict the use of online marketplaces can benefit from the exemption provided by Article 2 (1) of Reg. No 720/2022, provided that the agreement does not, directly or indirectly, have the object of preventing the effective use of the internet by the buyer to sell the contract goods or services to particular territories or customers, within the meaning of Article 4, point (e) of the Regulation and that the market shares of both the supplier and the buyer do not exceed the thresholds set out in Article 3 of the Regulation.[49]

The European Commission has thus transposed the principles expressed in *Coty* case, where the Court of Justice of European Union (CJEU) assessed the legality of third-party platform bans.[50]

The case arose out of a request for a preliminary ruling posed by the Frankfurt Court of Appeal. Precisely, the dispute concerned a modification introduced in March 2012 by *Coty* Germany - a German luxury cosmetics supplier - to its contracts, according to which « the authorised retailer is entitled to offer and sell the products on the internet, provided, however, that that internet sales activity is conducted through an "electronic shop window" of the authorised store and the luxury character of the products is preserved». In addition, another clause expressly prohibited the use of a different business name and also the recognisable engagement of a third-party undertaking which was not an authorised retailer of *Coty Prestige*. A footnote to that clause stated that «accordingly, the authorised retailer is prohibited from collaborating with third parties if such collaboration is directed at the operation of the website and is effected in a manner that is discernible to the public».

Parfümerie Akzente, a company that had been operating for years as an authorized reseller of *Coty Germany* products in Germany, refused to approve those amendments, and *Coty Germany* launched a case seeking an order prohibiting *Parfümerie Akzente* from distributing products bearing the brand through the platform 'amazon.de'.The Court of first instance refused on the grounds that Coty's selective distribution network was unjustified and that the specific restrictions on online sales constituted a hardcore restriction which could not benefit from the VBER (330/2010) or from an individual exemption. Coty Germany subsequently appealed to the Higher Regional Court which referred the question to the CJEU.

In its ruling, the CJEU, broadly agreed with Advocate General Wahl's opinion that luxury brands may prohibit authorized distributors in a selective distribution system from using in a discernable manner third-party platforms to sell the brand's goods.

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[49] Paragraph 335.

[50] Case C-230/16, *Coty Germany GmbH c Parfümerie Akzente GmbH*, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62016CJ0230&from=EN.
For a comment on the decision, V. R. Pardolesi, Prodotti di lusso, distribuzione selettiva e piattaforme per l'E-commerce, in Foro it., 2018, p. IV, col. 11. See also G Colangelo, V Torti, 'Selective distribution and online marketplace restrictions under EU competition rules after Coty Prestige' (2018) 14(1) European Competition Journal, 81 ff.; M Casoria, 'Selective distribution online in the aftermath of the coty Germany case' (2020) 1 Opinio Juris in Comparatione, 31 ff.

In particular, the Court stated first that a selective distribution system whose primary objective is the protection of the luxury image of the products does not fall within the prohibition of Article 101(1)1 TFEU when the three conditions established in the *Metro* case (*supra*, § 5) are met.[51]

Secondly, the Court considered that the prohibition imposed on the members of a selective distribution system to use a marketplace for online sales without it being apparent that the marketplace meets the quality requirements required by the supplier to its authorised dealers is functional to the preservation of the luxury image as it ensures that the products are exclusively associated with authorized distributors.[52]

Thirdly, the Court considered that the ban on using third-party online platforms in a discernible manner does not constitute a hardcore restriction under Articles 4(b) or (c) of VBER, because is does not limit the customers to whom the distributor can sell, or the territory in which these sales may be made.

It is worth noting that third-party platforms bans have also been examined several times by national authorities and courts.

Starting with Germany, the *Asics* case deserves to be mentioned. In the present case, there were several restrictions on Internet sales. Resellers were not allowed to allow third parties to use the *Asics* trademarks in any form on the third-party's website to direct customers to the website of the authorized *Asics* reseller. The contract also prohibited support for the functionality of price comparison engines. In addition, resellers were prohibited from advertising or selling contract products through the third-party's website. The German Federal Court of Justice, confirming a corresponding decision of the Bundeskartellamt (the German antitrust authority) against the well-known brand[53], found that with such a combination of restrictions there was no guarantee that consumers would have significant access to the Internet offers of authorised retailers. With specific regard to third-party platform bans, according to the Court, *Coty* case conclusions could not be applied to the *Asics* distribution system: first, because this system included sports and running shoes, and therefore not luxury goods; second, because it provided for sales restrictions that went beyond the prohibition to use third-party platforms.[54]

Turning to France, noteworthy is the *Caudalie* case, where the Court of Cassation annulled a decision of the Paris Court of Appeal that had qualified the prohibition imposed on authorized retailers to use third-party websites as a "probable" restriction of competition by object. According to the Court of Cassation, the ban on the use of third-party platforms is part of the legitimate

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[51] In the present case, the Court stated that the clause complied with Article 101(1) TFEU, since it was appropriate in order to safeguard the luxury image of *Coty*'s products, in line with the interest that the products be reconnected only to authorised distributors, objective, uniform and non-discriminatory.

[52] The Court pointed out that this prohibition is also necessary because it allows the supplier to verify compliance with qualitative criteria, which would not be possible in relation to the operator of a marketplace as a third party to the contractual relationship between supplier and authorised distributor.

[53] The decision in available at the following link <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=Aktuell&Sort=12288&nr=80673&pos=25&anz=515>.

[54] About the compatibility between this decision and *Coty*, B Zelger, 'Restrictions of online sales and vertical agreements: Bundeskartellamt vs. Commission? Why Coty and Asics are compatible' (2018) 14(2-3) European Competition Journal, 445 ff.

commercial policies of companies to select the distribution circuits on which to market their products.[55]

Furthermore, there is the well-known decision handed down by the Court of Amsterdam on October 4, 2017 in the *Nike* case, despite the prohibition on online third party platforms applied by Nike within its European selective distribution system. The Dutch judge, relying entirely on the opinion of Advocate General Wahl rendered in the *Coty* case, found this restriction valid. In particular, the court found that *Nike* products should be considered luxury goods and that the policy was aimed at maintaining the brand image.[56]

Finally, following the orientation of the European Court of Justice, Italian case law has also been sensitive to the need to protect the image and prestige of the brand in e-commerce.

It is worth mentioning the interlocutory injunction of the Court of Milan, which upheld the complaint filed by *Sisley* against *Amazon* - a party extraneous to the authorized distribution network - accused by the French brand of selling its prestige cosmetics on the market without preserving the exclusive image that distinguishes them.

As was mentioned at the beginning, the principles stated in the *Coty* judgement and consolidated in the subsequent case law, including national case law, are now explicitly stated in the new VBER Guidelines, which go one step further: the prohibition on selling via marketplaces can be imposed regardless of the distribution system operated. It is not required that the supplier operates a selective distribution system in order to impose qualitative online criteria.[57]

The Guidelines also provide guidance for the assessment of restrictions on the use of online marketplaces in individual cases where the market share thresholds set out in Article 3 of Regulation are exceeded. The European Commission specifies that restrictions on the use of online marketplaces are often agreed in selective distribution systems. In instances where the supplier does not enter into an agreement with the online marketplace, the supplier may be unable to verify that the online marketplace meets the conditions that its authorised distributors must fulfil for the sale of the contract goods or services. In that case, a restriction or ban on the use of online marketplaces may be appropriate and not go beyond what is necessary to preserve the quality and ensure the proper use of the contract goods or services. However, in cases where a supplier appoints the operator of an online marketplace as a member of its selective distribution system, or where it restricts the use of online marketplaces by some authorised distributors but not others, or where it restricts the use of an online marketplace, but uses that online marketplace itself to sell the contract goods or services, restrictions on the use of those

[55] The decision in available at the following link <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000035573298&fastReqId=1430212509&fastPos=1>.

[56] The decision in available at the following link <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBAMS:2017:7282>.

[57] Strongly critical of the exemption of so-called online marketplace bans is A Ezrachi, 'The ripple effects of online marketplace bans' (2017) World competition, 47, who considers them to be anti-competitive clauses by object.

online marketplaces are unlikely to fulfil the conditions of appropriateness and proportionality.[58]

8. Conclusions

The great expansion of e-commerce in the last decade has had a deep impact on distribution strategies, so the need to develop rules and adapt existing ones to the new digital reality and new market players, such as online platforms.

With particular regard to selective distribution in the luxury sector, the issue is to find the right compromise between the protection of the brand's image on the one hand, and the protection of competition on the other. In fact, the restrictions on online sales put in place by the supplier in order to protect its brand image risk reducing the number of online distributors, thus reducing price competition and consequently compromising retailers' business opportunities and consumers' choice.

What emerges from the examination of antitrust law, is that Reg. No 720/2022 consolidates a legislative and jurisprudential trend with a clear favour towards the selective distribution system, not only of well-known and prestigious trademarks, but more in general, precisely to safeguard the aura of luxury.

According to the new VBER, the 'nature' of the goods or services subject to qualitative selective distribution is relevant to exclude the application of Article 101(1) TFEU. On the contrary, where the market shares are below the thresholds of the Regulation - and the further conditions for its application are fulfilled - selective distribution agreements, like exclusive distribution agreements, fall within the scope of the VBER regardless of the type of goods or services marketed.

If this is the general framework of reference, then, for the purposes of granting the exemption, it would perhaps have been appropriate, within the new Regulation, to give greater weight to the requirements of the Metro judgment.

In particular, there is still uncertainty about the notion of goods capable by nature of justifying recourse to selective criteria: thus, for example, it is not specified when a good can be defined as "luxury" or of a "technological nature" nor is it clarified whether the mere protection of the reputation of a brand - beyond the technological nature and/or the aura of luxury of the goods and services marketed - can make a selective distribution system necessary.

Looking at the case law, it is clear that greater clarity on these concepts would have been essential. Making a comparison between the *Coty* case and the *Asics* case, although the two cases have a lot in common and the clauses under scrutiny are very similar in both cases, the nature of the product for which the selective distribution were established is different. Because a selective distribution system has both pro-and anticompetitive effects, these effects can have different strength for different products. The decisions point out that procompetitive effects tend to dominate for luxury goods, in which

[58] Paragraph 335.

channel coordination is particularly important, whereas the anticompetitive effects tend to dominate for more 'regular' products[59]. Not to mention, among other things, that already assessing whether a product is luxury or not is not always so easy (especially since within the same macro-category of luxury there are various distinctions). Just think of the different solutions adopted by the in the *Asics* case and in the *Nike* case. In the first case, among the arguments used by the the German Federal Court of Justice to support the illegality of the restrictions in question, there was also the consideration that in this case the products covered by the contract were sports goods, in particular running shoes and, therefore, not luxury goods. In contrast, in the *Nike* case, the Amsterdam Court admitted the restrictions submitted to it, qualifying the *Nike* products as luxury goods.

It is clear that in both cases we are talking about sports goods of brands that pose themselves as competitors. Well, we are aware that there are some *Nike* shoes, especially collectible shoes, which can be very expensive. What we want to underscore is that, in the *Asics* case, the German Federal Court excluded the luxury connotation just because there were sports shoes, as if a sports product, by definition, cannot be luxury; while in the *Nike* case the District Court of Amsterdam did not start from such a foreclosure.

In this context, we certainly do not intend to enter into the merits of how such products should be qualified (whether luxury or not); but these two cases compared clearly demonstrate how the different criteria in qualifying the contractual product can lead to different outcomes at the legal level.

From the examination carried out, it is evident the need for clearer rules, which meet the need of predictability of the company that concludes contracts in the exercise of his business. The company must be able to foresee, must be able to calculate what will happen. The lack of a certain and calculable law inevitably exposes it to interpretative subjectivism[60] (in this case not only of judges, but also of antitrust authorities).[61]

Another critical aspect of the new VBER concerns the prevision that a selective distribution system on the basis of purely quantitative criteria seem

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[59] Notice that the French Competition Authority, in the *Stihl* decision (n. 18-D- 23, *Pratique mises en œvre dans le secteur de la distribution de matériel de motoculture*), aligning with the European Court of Justice approach on the assessment of online sales restraints, ruled that the principles set out in *Coty Germany* as for the competition assessment of online sales ban applies beyond the luxury sector. On this decision, see M Giannino, 'The French Competition Authority holds that platform bans outside the luxury sector may not breach competition' available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3320558>.
Then, decision was confirmed, almost in its entirety, by the Paris Court of Appeal (decision 17 October 2019, RG 18/24456). Unfortunately, judges refused to refer preliminary questions to the European Court of Justice. This is regretful considering the opposite position of other national authorities, like the German one.

[60] In this regard, it's worth mentioning the important contributions of N. Irti on the calculability of law: N Irti, Nomos e lex (Stato di diritto come Stato della legge) (2016) Riv. Dir. Civ., 590; N Irti, 'Un diritto incalcolabile' (2015) I Riv. Dir. Civ 1; N Irti,' Capitalismo e calcolabilità giuridica (letture e riflessioni)' (2015) Riv. Soc., 801; N Irti, 'Calcolabilità weberiana e crisi della fattispecie' (2014) Riv. Dir. Civ., 687. See also the collection of these studies in N Irti, *Un diritto incalcolabile* (2016).

[61] As observed by F Cintioli, *Giudice amministrativo, tecnica e mercato. Poteri tecnici e "giurisdizione"* (2005), 98, the independent authority's decision takes on an integrative function of the rule, not limiting itself to the literal interpretation and implementation of the legislative dictate, but rather affecting its configuration in order to apply it to the concrete case. For an extensive study on the relationship between independent authorities and private autonomy, see the collection of contributions in G Gitti (ed.), *L'autonomia private e le autorità indipendenti* (2008).

to be automatically eligible for the block exemption.[62] It should be noted than, on the basis of the 2010 Guidelines, quantitative selective distribution criteria could at most have been added to qualitative criteria. What is perplexing about the new rules, is that, in practice, a selection based only on the number of distributors (or on the relative quantities of goods and services) ends up overlapping with exclusive distribution models, allowing - by reason of the mere qualification as "selective distribution" given to it by the supplier - also restrictions on passive sales to unauthorised distributors, which at this point, however, appear to lack a plausible economic-legal justification. Even if the aforementioned possibility of withdrawal or disapplication were to exist, it would have been preferable for purely quantitative selective systems to be removed from the general block exemption in order to allow for an individual assessment on the basis of the conditions of Article 101(3) TFEU.[63]

Finally, a few remarks on sustainability. It is certainly appreciable that the new rules show attention to one of the great issues of our time.[64] The new Guidelines state that sustainable development is a fundamental principle of the Treaty and a priority objective of the Union's policies,[65] while starting from the basic idea that vertical agreements pursuing sustainability objectives do not constitute a distinct category of agreements: thus, they will have to be assessed according to the general criteria and the exemption of Art. 2(1) VBER will apply to vertical agreements that pursue sustainability objectives, provided they fulfil the conditions of the same Regulation. It follows that the principle is

[62] See especially paragraphs 144 and 151.

[63] So, C Garilli, 'La disciplina antitrust delle intese verticali' (n 28),122.

[64] The attention of institutions as well as companies to sustainability has become increasingly important. The issue of sustainability necessarily has implications for competition.
Just think for example of the green claims, wich have effects on potential consumers and competitors. If sustainability claims turn out to be capable of creating misleading expectations about the environmental performance of the proposed good and the socially oriented attentions of its production cycle, the regulations aimed at combating unfair commercial practices, the one on anti – competitive offenses and the one on misleading advertising must necessarily intersect their spheres of operation and are called upon to intervene in the face of the same conduct capable of distorting market dynamics. So F Bertelli, 'I green claims tra diritti del consumatore e tutela della concorrenza' (2021) 1 Contr. impr., 303.
With specific regard to consumers, worthy of note is the delicate issue of the theoretical problems raised up by the dialogue between law and cognitive psicology. For a further exploration on this topic, see R Caterina, 'Psicologia della decisione e tutela del consumatore: il problema delle "pratiche ingannevoli"' (2010) 2 Sistemi intelligenti - Rivista quadrimestrale di scienze cognitive e di intelligenza artificiale, 2211 ff., who, starting from the overcoming of the model of homo oeconomicus and the theory of rational choice, notes how consumer law has equipped itself with tools that can serve to crack down on abuses of techniques based on manipulation or pressure psychological pressure by companies, through Directive 2005/29/EC on unfair commercial practices (implemented in Italy in Art. 20 ff. of the Consumer Code). According to the Author, consumer law responds not so much to the purpose of protecting individuals who behave irrationally as to discourage the efforts that are put in place by companies to mislead them or put pressure on their psychological defenses; and thus to create the conditions for competition to have outcomes of some social utility.

[65] Paragraph 8. The exemplifications contained in this paragraph would at first sight seem to restrict these concepts to the pursuit of environmental protection goals only; however, the Guidelines themselves allow for other definitions of sustainability contained in Union law. Therefore, in the light of the Guidelines, one might tend towards a broader notion, such as to include all the objectives of the UN 2030 Agenda.
In this regard, it is important to emphasise that the multiple targets described in the Agenda 2030 cannot be pursued in isolation, so that even the objectives that cannot be immediately linked to the protection of the dignity of the person - think, in particular, of those that are distinctly environmental (13 - Climate Action, 14 - Life below Water, 15 - Life on Land) - are still functional to it insofar as they are prodromal to the increase in common wellbeing and aimed at ensuring the widespread enjoyment of universal rights and the increase in the capacity to realise individual aspirations. So, F Bertelli, *Le dichiarazioni di sostenibilità nella fornitura di beni di consumo* (2022) 13.

that the sustainable objectives that may be pursued by an agreement do not exempt it from the application of the competition rules, nor do they give the relevant agreement, be it horizontal or vertical, a special character. However, as mentioned before (§ 6) the new Guidelines state the possibility that a selective distribution system may be based on qualitative criteria referring to the achievement of sustainability objectives, such as climate change, protection of the environment or limiting the use of natural resource. It seems that the new legislation introduced a selective criterion – the environmental criterion – unrelated to the typical purpose of a selective distribution system, i.e. to preserve the aura of luxury of certain products. On closer inspection, however, it cannot be ruled out that, in the near future, the concept of luxury, which according to the prevailing legal orientation is also the result of intangible characteristics, may also include that of environmental sustainability, thanks to a profound change in consumer demands.

In conclusion, beyond the highlighted weak points, the new VBER, recognising the many benefits and pro-competitive effects of the selective distribution system, now offers more flexibility and more tools to protect the brand's image. It will be interesting to see how this strengthened protection of selectivity will be applied by the courts in the future, also in relation to the recognition of the damage to the brand value in case of *breach* by the distributors of their contractual obligations. In this regard, it is observed that the proof of this prejudice to the value of the brand is often 'diabolical', so that it would be desirable for the courts to rely, in the presence of certain proven factual circumstances, (such as, for example, the manner of sale detrimental to the prestige of the brand, the mixing of luxury products with those of low quality, the presence of links directing to sites of different products and the lack of customer service) on a presumption *iuris tantum* of the prejudice suffered by the owner of a well-known trademark.[66]

[66] In these terms, P Gelato, S Vergano, 'Prime note a margine del Reg. UE 720/2022 e riflessi in materia di distribuzione selettiva' (n 28) 107.