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In the run up to the Commission's reform of its vertical restraints legislation, the advisers of luxury brands and the online retailers are busily slugging it out.

Arguments are traded on free riding and the scope of the single market objective, claims are made as to who is the most pro-consumer. However, above the din of battle in the antitrust silo an enormous paradigm shift is taking place which is likely to render this technical dispute largely irrelevant.

Already before the economic crisis consumer reaction to technology had begun to raise questions as to whether selective distribution systems could legitimately apply online. Now with the economic crisis, the market paradigm underpinning a view of the application of competition law has collapsed. Out of the wreckage we will see a different paradigm rising. It is likely to result in the development of a much more consumer-focused antitrust law, with a heavy burden of proof on business to justify why any market restriction can be justified. Selective distribution in particular will come under enormous pressure in a context where business is under deep suspicion by consumers, media, and the European political class.

With the advent of internet technology, its mass dispersal, and then the growth of

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broadband across the West, consumers began to go online to make purchases, even for big ticket items. Clearly, it is understandable that luxury brands who have made considerable investments in building their brands and developing their offline selective distribution networks want to restrict online retailing. It is also understandable that the brands and their selective distributors resent free riding online retailers. However, these understandable reactions ignore the way that new technology has transformed consumer tastes and preferences. Over the last decade more and more consumers have become familiar with the internet and online retailing. The ease and convenience of this form of retailing has begun to change consumers' attitudes to the sales experience.

This new form of retailing has clearly made price comparisons much easier, driving down prices to consumers' great benefit. It has also begun to change the way that consumers view the purchase of products and services. Consumers are willing to purchase expensive goods and services online without reference or interest in the added services provided by the supplier and the local distributor. Price is usually decisive, and if added services are required—such as information and support—they can be often found online and for free. In this enabling internet retailing environment, it is open to question what added value the luxury brand owner can bring to the consumer, that the consumer will really value.

If that were not enough from a consumer perspective, the idea of any access restriction to websites in other EU countries is an anathema. The ability to call up different websites in different countries selling the same product and check different prices is one of the added values of the internet that consumers value.

Selective distributors also overlook the impact of the single market concept among EU officials, Members of the European Parliament (“MEPS”), and the public. Whatever the technicalities of Community law, the concept of a “single market” in a world where cross-border online purchasing is possible encourages the idea of being able to pick up goods and services from anywhere across the single market. This more populist view of the single market concept is likely to make it very difficult to sustain any selective distribution restrictions in the online world. It is difficult to explain to a consumer or a MEP why, in a “single market,” consumers should not be able to go online and obtain goods and services as they please, and equally why retailers should not be able to seek and serve customers from anywhere in the single market.

The economic crisis will massively compound the problem for selective distributors. The legitimacy of the corporate world in the eyes of the public, media, and politicians has been severely damaged by the delinquency of the banking sector. Corporate Europe is tainted by association; the ability of business to get a hearing and make a case has been compromised for some years to come. To make a case for restricting the rights of consumers to obtain goods or services in the current climate is likely to be very challenging. Furthermore, in the economic crisis consumers are going to be even keener to search online for low priced goods and services. It would be a brave politician who would support a corporate argument on the value of selective distribution over consumer (and voter) demands for low prices and maximum choice in the greatest recession since the 1930s.

Worse still the economic crisis has seen the collapse of the neo-liberal economic

model that has increasingly come to govern economic- and antitrust-policy making over the last two decades. European antitrust policy is likely to be transformed by the crisis. There are two major factors that are likely to affect antitrust policy. First, we are likely to see a distinct rejection of the Chicagoist economic model and a return to a more traditional European ordoliberalist approach. This will include, for instance, a much more extensive application of Article 82. From the point of view of luxury brands, such a switch to a more ordoliberalist approach would at first sight appear to be helpful. It could be deployed to assist luxury brands to maintain the integrity of their distribution networks. However, this view overlooks the impact of the second factor, a very strong antibusiness, pro-consumer impact on antitrust policy. The likelihood is that Corporate Europe will face a very high burden of proof when they seek to argue for restrictive contractual arrangements.

The cumulative impact of technological development, consumers' reactions and appreciation of the technology, populist conceptions of the single market, and the ideological collapse engendered by the economic crisis are enormously powerful. They are likely to have a much greater impact on the debate on online retailing than all the arguments within the antitrust silo.