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I. INTRODUCTION

On April 20, 2010 the European Commission (“Commission”) adopted Regulation No 330/2010² (“Regulation”), which lists the conditions under which vertical agreements³ are exempt from the prohibition on anticompetitive agreements (defined by Article 101(1) of the Treaty on the Functioning of the European Union, “TFEU,” formerly known as Article 81(1) of the EC Treaty). On the same date, the Commission also adopted a set of guidelines providing assistance to firms on how to assess the compatibility with Article 101 TFEU of vertical agreements falling outside the scope of the Regulation’s safe harbor (“Guidelines”). The Regulation and Guidelines replace, as of June 1, 2010, the previous regulation⁴ (“Former Regulation”) and guidelines on vertical restraints (“Former Guidelines”),⁵ and will remain in force until May 2022.⁶

Apart from the addition of a new market share threshold to be able to qualify for the safe harbor,⁷ the Regulation does not introduce significant novelties compared to the Former Regulation. In particular, the list of so-called hardcore restraints (i.e. restraints that, if contained in a vertical agreement, would render the safe harbor inapplicable to the entire agreement) has

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² 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, pp.1-7.

³ Vertical agreements are defined by the Regulation as agreements “entered into between two or more undertakings each of which operates, for the purposes of the agreement or the concerted practice, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services” (Article 1(1)(a)).

⁴ Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, OJ L 336, 29.12.1999, pp. 21-25.

⁵ Commission notice - Guidelines on Vertical Restraints, OJ C 291, 13.10.2000, pp. 1-44.

⁶ Article 9 of the Regulation provides that suppliers and distributors whose agreement falls, on May 31, 2010, within the safe harbor of the Former Regulation must comply with the new Regulation only by May 31, 2011. This transitional period does not apply, in principle, to the novelties contained in the Guidelines that reflect the Commission’s new approach to certain issues, such as the clarifications of the type of restrictions on internet selling and advertising that are presumed to constitute hardcore restraints (see section V). It is unlikely, however, that during the transitional period the Commission will enforce its new policy with respect to agreements containing restrictions that, according to the Former Guidelines, were not expressly qualified as hardcore restraints.

⁷ The Former Regulation provided a “safe harbor” for vertical agreements if the market share of the supplier did not exceed 30 percent in the market in which it sold the contract goods or services. Only where the vertical agreement contained an exclusive supply obligation (i.e., an obligation on the supplier to sell its goods to only one buyer inside the EU), the 30 percent market share threshold was calculated on the market where the buyer purchased the contract goods. By contrast, according to the Regulation, the safe harbor now applies “on condition that the market share held by the supplier does not exceed 30 percent of the relevant market on which it sells the contract goods or services and the market share held by the buyer does not exceed 30 percent of the relevant market on which it purchases the contract goods or services” (Regulation, Article 3(1)).

remained practically unchanged. Thus, the Regulation, as with the Former Regulation, considers as hardcore restraints any territorial or customer sale restriction imposed by the supplier on its distributors, with some exceptions.⁸ Among these exceptions, the Regulation recognizes: (i) the restriction of the distributor's freedom to make "active sales" (i.e., sales solicited by the distributor) into the exclusive territory or to an exclusive customer group reserved to the supplier or allocated by the supplier to another distributor, where such restriction does not limit sales by the customers of the distributor,⁹ and (ii) the restriction of sales by members of a selective distribution system to unauthorized distributors "within the territory reserved by the supplier to operate that system."¹⁰

In addition, like the Former Regulation, the Regulation considers as hardcore restraints any restriction imposed by a supplier on its retailers, when they are members of a selective distribution system, to make active or "passive sales" (i.e. sales unsolicited by the retailer) to end users.¹¹

It is against this background that various questions arise with regard to the type of internet sales restrictions that a supplier can impose upon its distributors. For instance, should internet sales be qualified as active or passive sales? Can a supplier impose an outright ban on internet sales upon its distributors and, if the answer is positive, under what circumstances? What restrictions on internet sales can be imposed on the members of a selective distribution network? These questions are not new, however. Indeed, many of them were already debated following the adoption of the Former Regulation,¹² and addressed, albeit rather briefly, in the Former Guidelines.

Realizing that the increasing level of internet sales constituted one of the major market developments in recent years, in July 2009 the Commission announced that it would review the Former Guidelines in order to provide, inter alia, more guidance on the issue of internet sales.¹³ It is therefore not surprising that the guidance concerning internet sales provided in the

⁸ Regulation, Article 4(b).

⁹ Regulation, Article 4(b)(i).

¹⁰ Regulation, Article 4(b)(iii). Article (1)(1)(e) of the Regulation explains that selective distribution "means a distribution system where the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to distributors selected on the basis of specified criteria and where these distributors undertake not to sell such goods or services to unauthorised distributors within the territory reserved by the supplier to operate that system." It should be noted that the expression "within the territory reserved by the supplier to operate that system", was not present in the Former Regulation. This change, the rationale and the implications of which are not entirely clear, can be expected to have a chilling effect on the suppliers' choice to establish a selective distribution system in certain EU countries while using other forms of distribution (for instance exclusive distribution) in other EU countries (see F. Amato, *The European Commission's Proposed Revision of EU Competition Rules Applicable to Vertical Restraints*, ABA ANTITRUST SECTION, JOINT CONDUCT COMMITTEE E-BULLETIN, Winter 2010, pp. 6-7; and F. Amato, S. Macchi di Cellere, & J. Zöttl, *The New EU Rules on Vertical Restraints*, in LAW 360, May 2010).

¹¹ This, however, is without prejudice to the possibility of imposing on these retailers the obligation to operate from a specific "place of establishment Regulation, Article 4(c). This provision is identical to the provision of Article 4(c) of the Former Regulation.

¹² See, for instance, C. Vajda & A. Gahnström, *EC Competition Law and the Internet*, Vol. 21 (2), EUROPEAN COMPETITION L. REV., 2000, 94; and F. Amato & R. Subiotto, *The Reform of the European Commission Policy Concerning Vertical Restraints*, 69 ANTITRUST L.J., 2001, 147.

¹³ See Commission's press release IP/09/1197 of 28 July 2009, *Antitrust: Commission launches public consultation on review of competition rules for distribution sector*, available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1197&format=HTML&aged=0&language=EN&guiLanguage=en>.

Guidelines constitutes the Commission's most, if not the primary, debated novelty introduced into the law on vertical restraints.¹⁴

To fully appreciate the significance and impact of the new guidance, the following sections describe: (i) how the Commission treated internet sales under the Former Guidelines, (ii) how national courts and competition authorities have dealt with internet sales restrictions during the period of applicability of the Former Guidelines, (iii) the clarifications and changes concerning internet sales proposed by the Commission in its 2009 draft guidelines on vertical restraints (the "Draft Guidelines"),¹⁵ and (iv) the approach eventually adopted by the Commission in the final text of the Guidelines.

II. THE COMMISSION'S APPROACH TO INTERNET SALES RESTRICTIONS UNDER THE FORMER GUIDELINES

The Former Regulation was silent on the issue of internet sales restrictions. Only three paragraphs of the Former Guidelines provided guidance,¹⁶ under the section describing the scope of hardcore restraints listed in the Former Regulation.

In summary, under the previous exemption regime, the Commission's approach to internet sales was as follows:

- *Internet sales and promotion were presumed to be passive sales.* Sales resulting from the distributor's use of the internet were considered, in principle, as a form of passive sale, as they could be deemed to be a "reasonable way" to reach every customer.¹⁷ Therefore, according to the Commission, if a customer visited the website of a distributor and contacted the distributor, and if such contact led to a sale, including delivery, then this should be considered as passive selling.¹⁸ The language used on the website or in the communication with the potential customer would normally play no role in that respect.¹⁹

¹⁴ Besides the submissions of a number of directly interested stakeholders, such as online commercial platforms and luxury goods producers (that can be found on the Commission's website), many authors have written on this issue during and after the period of the public consultation of the Commission's draft regulation and guidelines on vertical restraints. See, for instance, A. Font Galarza & C. Gissler, *Selective Distribution of Branded and Luxury Products and the Conjunction of Online and Offline Commerce in the Light of the European Commission's Revisions of the Vertical Restraints Regime*, GCP MAGAZINE (Mar-09); K. Mahlestein, *Vertical Restraints and Competition Policy – Internet Sales, a New Dimension to be Considered*, GCP MAGAZINE (Mar-09); A. Riley, *Online Retailing and Antitrust: Taking Account of the Paradigm Shift*, GCP MAGAZINE (Mar-09); S. Kinsella & H. Meline, *Who's Afraid of the Internet? Time to Put Consumer Interests at the Hearth of Competition*, GCP MAGAZINE (Mar-09); E. Clark, M. Hughes & D. Waelbroeck, *Selective Distribution and Luxury Goods: The Challenge of the Internet?*, GCP MAGAZINE (Aug-09); T. Buettner, A. Coscelli, T. Vergé & R.A. Winter, *An Economic Analysis of the Use of Selective Distribution by Luxury Good Suppliers*, EUR. COMPETITION J., 2009, 5, p. 201; S. Kinsella, H. Melin & S. Schropp, *Comments on the CRA Paper Entitled "An Economic Analysis of the Use of Selective Distribution by Luxury Good Suppliers"*, EUR. COMPETITION J., 2009, 5, p. 227; T. Buettner, A. Coscelli, T. Vergé & R.A. Winter, *Selective Distribution by Luxury Good Suppliers: a Response to Kinsella et al.*, EUR. COMPETITION J., 2009, 5, p. 613; L. Idot, A. Gurin, R. Saint-Esteben, M. Chagny, & M. Malaurie-Vignal, *Colloque AFEC "Distribution et Internet"*, CONCURRENCES, No 1-2010, October 2009; P. Marsden & P. Whelan, *Selective Distribution in the Age of Online Retail*, EUR. COMPETITION L. REV., 2010, p. 26.

¹⁵ The Draft Regulation, the Draft Guidelines and the observations submitted by all interested parties can be found on the Commission's website through the following link:
http://ec.europa.eu/competition/consultations/2009_vertical_agreements/index.html.

¹⁶ Namely, in ¶¶ 50, 51, and 53.

¹⁷ Former Guidelines ¶ 50, second indent, and ¶ 51.

¹⁸ *Id.* ¶ 51.

¹⁹ *Id.*

- *Internet sales/promotions could be prohibited only if these would lead to active sales into an exclusively allocated territory or customer group.* The supplier could prevent the distributor from using the internet to sell or promote the contract goods or services only to the extent that this “would lead to active selling into other distributor’s exclusive territories or customer groups.”²⁰ The Former Guidelines provided two examples of active selling through the internet: (i) the use of websites with banners or links in pages clearly designed to reach primarily customers within territories or customer groups exclusively allocated to another distributor or reserved to the supplier, and (ii) unsolicited e-mails sent to individual customers within territories allocated to another buyer or reserved to the supplier.²¹
- *No outright ban on internet sales/promotions could be imposed unless objectively justified.* An outright ban on using the internet to advertise or to sell the contract goods or services could be imposed upon the distributor only if objectively justified.²² Thus, a ban on selling or advertising dangerous substances or products over the internet would very likely to be considered as objectively justified, provided that the supplier himself did not use the internet to sell or advertise the same goods.²³ There could never be an objective justification if the supplier reserved to itself, or to another buyer, the exclusive right to sell or advertise over the internet.²⁴
- *Quality standards on internet sales were admitted under certain conditions.* The Former Guidelines also made clear that in a selective distribution system, the dealer should be free to advertise and sell with the help of the internet,²⁵ but that suppliers were allowed to impose quality standards on the distributors’ use of the internet to resell the contract goods, “just as the supplier may require quality standards for a shop or for advertising and promotion in general.”²⁶

The Commission’s approach concerning internet sales restrictions, with specific regard to selective distribution systems, was further clarified in three cases decided by the Commission shortly after the adoption of the Former Guidelines.

In the first case, the Commission opened proceedings against B&W Loudspeakers, a manufacturer of premium loudspeakers, on the grounds that B&W’s selective distribution system contained, inter alia, a prohibition on the selected distributors from engaging in internet selling.²⁷ The proceedings were eventually dropped following B&W’s commitment to delete from its agreements a number of restrictions, including the internet sales restriction.²⁸

In the second case, the Commission decided not to raise objections to the selective distribution system of Yves Saint Laurent Parfums, only after the latter decided to apply “selection criteria authorising approved retailers already operating a physical sales point to sell via the Internet as well.”²⁹ In this case, therefore, the Commission has accepted that the

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.* ¶ 49.

²⁴ *Id.* ¶ 51.

²⁵ *Id.* ¶ 53.

²⁶ *Id.* ¶ 51.

²⁷ See Commission’s press release IP/00/1418, of 6.12.2000, available on the Commission’s website.

²⁸ See Commission’s press release IP/02/916, of 24.6.2002, available on the Commission’s website.

²⁹ See Commission’s press release IP/01/713, of 17.5.2001, available on the Commission’s website.

obligation imposed by a supplier upon its distributors to have a brick and mortar shop before engaging in internet sales is not a hardcore restraint but an admissible selection criteria.

In the third case, the Commission considered that the obligation imposed by Yamaha on its distributors to contact Yamaha before exporting via the internet the contract goods (in this case musical instruments) because of alleged divergent security standards, such as standards for the protection of radio frequencies, the dangerous materials regulation, and technical standards, “reinforced market partitioning” and constituted an “infringement contrary to Article 101(1) TFEU” because it “clearly discouraged” dealers from exporting.³⁰ The Commission noted that since products concerned were musical instruments, it seemed excessive to invoke the security norms and the clause on dangerous products before exportation.³¹ It also noted that such limitation existed only for exports arranged via the internet, and there was “no reason why they should be limited to such situations if concerns were really related to security norms.”³² It must be noted, however, that this was one of many other restrictions of Article 101(1) TFEU that the Commission found in its decision.

III. INTERNET SALES AND THE CASE LAW OF NATIONAL COURTS AND COMPETITION AUTHORITIES

The ever-increasing use of the internet by distributors to sell their products and by customers to seek the best possible deal has led, in recent years, to a number of disputes between producers of branded goods and their distributors in relation to the application of EU competition law in the area of internet sales restrictions. Following the decentralization of the application of EU competition law introduced by Regulation 1/2003,³³ however, most of these cases have been dealt with by national courts and national competition authorities.³⁴

For example, a Dutch court ruled that where a supplier of branded kitchen appliances applied different pricing and warranty conditions depending on whether a distributor sold the appliances over the internet or in its brick and mortar shop, such a practice was not contrary to the Former Regulation and Article 101 TFEU.³⁵ In particular, the Dutch court upheld the supplier’s argument that internet retailers provided less added value than specialist shops because, contrary to specialist shops, internet retailers sold the kitchen appliances to consumers “without providing expert advice and without taking care of the proper installation of the

³⁰ Commission decision of 16.7.2003 in Case COMP/37.975 PO/Yamaha, ¶ 107.

³¹ *Id.* ¶ 108.

³² *Id.* ¶ 108.

³³ See Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [now Articles 101 and 102 TFEU], OJ L 1 of 1.4.2003, p. 1. Regulation 1/2003 entered into force in May 2004 and replaced the centralized authorization system laid down by the former enforcement rules (according to which the Commission was the only body empowered to grant an Article 101(3) TFEU exemption with respect to an agreement that violated Article 101(1) TFEU) with a directly applicable exception system that renders the exemption rule of Article 101(3) TFEU directly applicable by national courts and competition authorities.

³⁴ To our knowledge, after the adoption of the Former Guidelines, the Commission has dealt with internet sales restrictions in vertical agreements only in the three cases mentioned in section II above, i.e. B&W Loudspeakers, Yves Saint Laurent Parfums and Yamaha. For an overview of the case law and Commission’s decision practice on vertical restraints following the adoption of the Former Regulation and Former Guidelines, see F. Dethmers & P. Posthuma de Boer, *Ten Yers On: Vertical Agreements under Article 81*, in EUR. COMPETITION L. REV., 2009, p. 424.

³⁵ A. Stoffer, *The Dutch District Court of Zutphen holds in an interim judgment that the Vertical Restraints Block Exemption Reg. n° 2790/99 covers the application of dissimilar terms and conditions of supply to internet retailers (Groen Trend & Schouten Keukens / AEP Home Products)*, E-COMPETITION, No 427, 30 December 2005.

appliances at the customer's home."³⁶ This resulted in increased costs for the supplier, who often needed to advise consumers on the use and maintenance of the appliances and to solve problems caused by inaccurate or faulty installation of appliances sold via the internet.³⁷

In another case, the French competition authority declared compatible with the Former Regulation and Article 101 TFEU a selective distribution system, whereby a supplier of branded watches required its authorized distributors to: (i) have an outlet to sell and display the contract goods (therefore excluding from the distribution network the so-called "pure players," i.e. retailers that sell exclusively through the internet), and (ii) obtain the supplier's prior approval before launching an internet advertising campaign or creating internet links. The authority found these obligations to be legitimate and justified by the aim to protect the brand's reputation.³⁸

The French competition authority reached similar conclusions in a case concerning the selective distribution of hi-fi and home-cinema equipment, where it considered it to be legitimate that a supplier of these goods could (i) exclude pure online retailers from its network and (ii) prohibit suppliers that sell both off- and online from selling online to customers who had not previously carried out a trial listening test in a physical outlet or benefited from personal advice to set up the equipment.³⁹

The possibility to exclude "pure players" from a selective distribution network was also confirmed by the Paris Court of Appeal in a case concerning the distribution of perfumes.⁴⁰ The Court considered that the obligations imposed by the fragrance manufacturer upon its authorized retailers to (i) have a physical outlet for more than one year and (ii) test new products only in physical outlets for a one year period, are qualitative selection criteria on internet sales justified by the nature of the products in question (i.e. perfumes) and cannot be considered, therefore, hardcore restraints pursuant to the Former Regulation.⁴¹

Similarly, a number of German courts have held that a prohibition imposed by a supplier upon its retailers to sell its branded school bags through an internet auction platform was not contrary to national and EU competition law, because this prohibition constituted a qualitative selection criteria that did not completely prevent internet sales and was adequate and proportionate to protect the suppliers' brand reputation.⁴²

Finally, the French competition authority considered that an outright internet sales ban imposed by a supplier of personal care and cosmetic products (Pierre Fabre Dermo-Cosmétique) upon its authorized retailers was a hardcore restraint that rendered the Former Regulation

³⁶ *Id.*

³⁷ *Id.*

³⁸ L. Cerny & F. Duridou, *The French Competition Council accepts commitments to modify selective distribution agreements as regards access to the network and advertising on the Internet (Festina)*, E-COMPETITION, No 12128, 24 July 2006.

³⁹ O. Ancelin & C. Sumon, *The French Competition Council agrees to commitments from Hi-Fi and Home Cinema equipment suppliers in order to allow their selective distributors to carry out online selling (Hi-Fi/Home Cinema)*, E-COMPETITION, No 12641, 5 October 2006.

⁴⁰ N. Lenoir, D. Roskis, & M-L Combet, *The Paris Court of Appeal confirms the possibility for a fragrance manufacturer to exclude pure players and to restrict internet sales within its selective distribution network (PMC Distribution / Pacific Création)*, E-COMPETITION, No 19680, 18 April 2008.

⁴¹ *Id.*

⁴² *Manufacturers' Selective Distribution Systems Excluding the Sale of Products through eBay Ruled Permissible under EU Law*, BLOOMBERG LAW REPORTS - ANTITRUST & TRADE, Vol. 3, No. 2, 2009, 5. See also D. Beling, *A German Court holds lawful ban of sales through online auction platforms by retailer (School bags manufacturer)*, E-COMPETITION, No 21863, 13 March 2008.

inapplicable to the agreements between such supplier and its authorized retailers, and could not qualify for an individual exemption pursuant to Article 101(3) TFEU.⁴³ The authority rejected the supplier's contention that internet sales are incompatible with the specific nature and qualities of personal care and cosmetic products and that the sale of these products required the presence of a pharmacist at a physical sale point.

Interestingly, Pierre Fabre Dermo-Cosmétique challenged the authority's decision before the Paris Court of Appeal. Moreover, considering that the coherent application of Article 101 TFEU might be at stake in this case, the Commission deemed it appropriate to file an *amicus curiae* written observation before the Paris Court of appeal in support of the French competition authority's decision.⁴⁴ Ultimately, the Court of Appeal made a reference for a preliminary ruling to the European Court of Justice. In that reference, the French court seeks to clarify whether a general and absolute ban on selling contract goods to end users via the internet, imposed on authorized distributors in the context of a selective distribution network, in fact constitutes a hardcore restriction for the purposes of Article 101(1) TFEU that is not covered by the block exemption provided for by the Former Regulation, but is potentially eligible for an individual exemption under Article 101(3) TFEU.⁴⁵ The case is currently pending before the Court of Justice.⁴⁶

IV. INTERNET SALES UNDER THE DRAFT GUIDELINES

In light of the cases described above, the new guidance on internet sales proposed by the Commission in the Draft Guidelines of July 2009 and broadly retained in the final text of the Guidelines (see below, section V), can be properly understood.

As regards internet sales, the Draft Guidelines proposed first to confirm that: (i) internet sales/promotions are presumed to constitute a form of passive sales;⁴⁷ (ii) internet sales/promotions could be prohibited only if they would lead to active sales into an exclusively allocated territory or customer group;⁴⁸ (iii) no outright ban on internet sales/promotions can be imposed unless objectively justified;⁴⁹ and (iv) the supplier may require quality standards for use of the internet site to resell his goods "just as the supplier may require quality standards for a shop or for advertising and promotion in general."⁵⁰ Most importantly, the Draft Guidelines proposed to add the following new guidance:

- The requirement imposed on distributors to have "a brick and mortar shop or showroom before engaging in online distribution" does not constitute a hardcore restraint, but a standard for use of the internet that is covered by the block exemption as long as the market share of the supplier and the buyer do not exceed 30 percent.⁵¹ This

⁴³J. Goyer, *The French NCA sanctions the prohibition of Internet sales imposed on the members of a selective distribution network, under Art. 81.1 EC (Pierre Fabre Dermo-cosmétique)*, E-COMPETITION, No 22891, 29 October 2008.

⁴⁴C. Momège, *Ventes par internet: La Commission européenne intervient devant la Cour d'appel de Paris sur la question des ventes par internet*, CONCURRENCE, No 1-2010, p. 161.

⁴⁵J. Goyer, *A French Court of Appeal makes a reference for a preliminary ruling to the ECJ on whether a general and absolute ban on Internet sales by approved distributors does constitute a "hardcore restriction" on competition by object within the meaning of Art. 81.1 EC (Pierre Fabre Dermo-Cosmétique)*, E-COMPETITION, No 22891, 29 October 2009.

⁴⁶Case C-439/09 *Pierre Fabre Dermo-Cosmétique*, OJ C 24 of 30.01.2010, p.27.

⁴⁷Draft Guidelines ¶¶ 51 and 52.

⁴⁸*Id.* ¶ 52.

⁴⁹*Id.* ¶ 54.

⁵⁰*Id.*

⁵¹*Id.* ¶¶ 54 and 172.

proposal clearly echoed the Commission's approach in the *Yves Saint Laurent Parfums* case described in section II above, as well as the approach of the French competition authority and German courts described in section III above.

- The following restrictions are considered restrictions of passive sales and therefore hardcore restraints: (i) requiring an exclusive distributor to make its website inaccessible, or transactions through its website impossible, to customers exclusively allocated (or resident in territories exclusively allocated) to another distributor; (ii) requiring a distributor to limit the proportion of overall sales made over the internet (without excluding, however, the possibility for the supplier to require the buyer to sell at least a certain absolute amount, in value or volume, of the products off-line to ensure an efficient operation of its brick and mortar shop); (iii) requiring a distributor to pay a higher price for products intended to be resold by the distributor online than for products intended to be resold off-line, without prejudice to the possibility to offer the distributor a "fixed fee" to support its off-line or online sales efforts.⁵²

During the public consultation period on the Draft Guidelines, this proposed new guidance generated a heated debate between online commercial platforms and luxury goods producers. While the former opposed any type of (direct or indirect) restriction of internet sales (such as, for instance, the possibility for suppliers to require distributors to have a brick and mortar shop before engaging in online distribution),⁵³ the latter challenged the Commission's proposed treatment of certain sales restrictions as "hardcore" (in particular, the requirement to make a proportion of sales through the brick and mortar outlet) and advocated greater freedom to set criteria and standards for online sales of their luxury branded products.⁵⁴

V. INTERNET SALES UNDER THE NEW GUIDELINES

Ultimately, in the final text of the Guidelines, the Commission was able to forge a compromise between the conflicting interests of online commercial platforms and luxury goods producers.

On the one hand, the Guidelines confirm and retain the guidance provided in the Former Guidelines (see above, section II) and the additional new guidance proposed in the Draft Guidelines (see above, section IV).⁵⁵ On the other hand, they add the following clarifications.

1. "Paying a search engine or online advertisement provider to have advertisements displayed specifically to users in a particular territory is active selling into that territory."⁵⁶ This is an additional example of active selling through the internet that was not present in the Former Guidelines (see above, section II).
2. The block exemption provided by the Regulation applies also if the supplier requires its authorized distributors to have "more brick and mortar shops or showrooms as a condition for becoming a member of its distribution system."⁵⁷ This is an important

⁵² *Id.* ¶ 52.

⁵³ *See*, for instance, the response to the Commission's consultation on the proposed reform submitted by eBay (available on the Commission's website).

⁵⁴ *See*, for instance, the response to the Commission's consultation on the proposed reform submitted by LVMH, Estée Lauder and the European Cosmetics Association – COLIPA (available on the Commission's website)

⁵⁵ *See* Guidelines ¶¶ 51-54, 56, and 60.

⁵⁶ *Id.* ¶ 53.

⁵⁷ *Id.* ¶ 54, emphasis added.

change compared to the Draft Guidelines, which only seemed to recognize the possibility of imposing the obligation to have one brick and mortar shop (see above, section IV). Moreover, the Guidelines clarify that the supplier can change this condition during the lifetime of its distribution agreements (for instance, requiring the opening of additional offline retail outlets) as long as the changes do not have “the object to directly or indirectly limit the online sales by the distributors.”⁵⁸

3. The supplier can impose internet quality standards on its authorized retailers. These standards, however, must be proportionate, i.e., they should be “overall equivalent to the criteria imposed for the sales from the brick and mortar shop” and should not consist of obligations that dissuade “appointed dealers from using the internet” to reach more and different customers.”⁵⁹
4. “A supplier may require that its distributors use third party platforms to distribute the contract products only in accordance with the standards and conditions agreed between the supplier and its distributors for the distributors' use of the internet. For instance, where the distributor's website is hosted by a third-party platform, the supplier may require that customers do not visit the distributor's website through a site carrying the name or logo of the third-party platform.”⁶⁰ While certainly a useful clarification, it is regrettable that the Guidelines do not also clarify whether a general prohibition to sell the contract goods on internet auction platforms would be considered by the Commission as compatible with Article 101 TFEU, as several German courts have recognized, for instance, with regard to the sale of branded school bags (see above Section III).
5. Although it is a hardcore restriction to agree that a distributor shall pay a higher price for products intended to be resold by the distributor online than for products intended to be resold offline (“dual pricing”), the Guidelines state that “in some specific circumstances, such an agreement may fulfill the conditions of Article 101(3).”⁶¹ This may occur where “selling online leads to substantially higher costs for the manufacturer than offline sales, [because, for example], when offline sales include home installation by the distributor but online sales do not, the latter may lead to more customer complaints and warranty claims for the manufacturer.”⁶² This example clearly echoes the Dutch case concerning branded kitchen appliances described above (see section III).
6. The Guidelines clarify that the safe harbor of the Regulation can be withdrawn “where the characteristics of the product do not require selective distribution or do not require the applied criteria, such as for instance the requirement for distributors to have one or more brick and mortar shops,”⁶³ or where cumulative foreclosing effects result from parallel networks of selective distribution systems.⁶⁴

⁵⁸ *Id.*

⁵⁹ *Id.* ¶ 56. The Guidelines further clarify that the criteria imposed for online sales must not necessarily be identical to those imposed for offline sales, but rather that they should “pursue the same objectives and achieve comparable results and that the difference between the criteria must be justified by the different nature of these two distribution modes. For example, in order to prevent sales to unauthorised dealers, a supplier can restrict its selected dealers from selling more than a given quantity of contract products to an individual end user” (*Id.* ¶ 56).

⁶⁰ *Id.* ¶ 54.

⁶¹ *Id.* ¶ 64.

⁶² *Id.*

⁶³ *Id.* ¶ 176. As regards the issue whether the characteristic of a product justify the use of a selective distribution system see, inter alia, the judgments of the General Court in Case T-19/92, *Groupement d'achat Edouard Leclerc v*

7. Last but not least, the Guidelines expressly classify the obligation to have a brick and mortar shop as a “qualitative selection” criterion.⁶⁵ This classification, which is somewhat counterintuitive,⁶⁶ may be useful in cases where the safe harbor granted by the Regulation does not apply, for instance because the supplier’s market share on the relevant market exceeds 30 percent. It should be borne in mind, however, that when the nature of the product does not justify the use of a selective distribution system, any selection criterion, including the obligation to have a brick and mortar shop, may be considered restrictive of competition.

VI. CONCLUSIONS

The above analysis shows that the Commission’s approach to internet sales restrictions under the new Guidelines has not fundamentally changed compared to the previous exemption regime. The Guidelines, however, provide some important clarifications as regards what types of internet sales restrictions are considered by the Commission to constitute hardcore restraints (e.g. the requirement on distributors to sell a portion of contract goods offline, or the different pricing of the contract goods depending on whether they are intended for online or offline sales). Furthermore, they indicate what are considered to be admissible selection criteria (e.g. the obligation to have one or more brick and mortar shops). These clarifications may please some stakeholders and displease others—indeed some of the Commission’s statements may be considered far from uncontroversial.⁶⁷

Overall, however, the Commission seems to have struck an acceptable compromise between various (and often opposing) interests without losing sight of the ultimate goal of competition policy: the interest of consumers. What is regrettable, however, is that such an important topic is still being dealt with by means of a “soft-law” instrument, such as Guidelines. Indeed, as under the previous block exemption regime, no provision of the new Regulation contains reference to the issue of internet sales. Although the Guidelines influence how national courts and antitrust agencies apply Article 101 TFEU in the 27 EU Member States, they are legally binding only on the Commission.

Commission [1996] ECR II-1851, paragraphs 112 to 123; and Case T-88/92 Groupement d'achat Edouard Leclerc v Commission [1996] ECR II-1961, paragraphs 106 to 117.

⁶⁴ *Id.* ¶ 188.

⁶⁵ *Id.* ¶ 179.

⁶⁶ See for instance, Guidelines at ¶ 175, which states that quantitative selective criteria are those that “more directly limit the potential number of dealers by, for instance, requiring minimum or maximum sales, by fixing the number of dealers, etc.” Arguably, imposing the obligation to have one or more brick and mortar shops limits the number of potential dealers just as much as a minimum sales obligation.

⁶⁷ For instance, why should an obligation to have a brick and mortar shop be qualified as a “qualitative” rather than “quantitative” selection criterion? Why should an obligation imposed on an authorized retailer to sell at least 5 percent of the contract goods through its brick and mortar shop be automatically presumed to constitute a hardcore restraint?