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Vertical agreements in online markets and the new regulatory dilemma

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Abstract

Vertical agreements, both in online and offline markets, have always been a paradoxical topic and constitutes one of the most dynamic disputes for antitrust enforcement. The reason for that is the fact that those alliances among companies can bring mixed effects on the competition process. On one hand they carry important economic efficiencies in the shape of cost savings to companies. On the other hand, they also bring about several anticompetitive concerns, such as risk of collusion or market foreclosure (in a form of selective distribution, geo-blocking, among others). These puzzled characteristics justify conflicting positions when it comes to their regulation. Over the decades, both the US and the EU have become more flexible towards vertical agreements and accepted that those contractual strategies can bring pro-competitive effects to markets rather than only anticompetitive concerns. The question raised in this paper is whether this shift to the application of the rule of reason or the sole ex-post control of vertical agreements should remain the same with the raise of new types of contractual arrangements in online markets. To answer to this question the paper firstly presents the economic analysis of vertical agreements. Then it describes how different legal systems (US and EU) have been dealing with these issues. Finally, the paper gives an illustrative example of vertical restraints in online market recently judged by the European Court of Justice, the *Coty Case.* The conclusion indicates that although authorities around the world have been trying to figure out the best way of adapting (or not) their legislation or case law to this new digital reality, there is still no right answer to the problem and further research is needed in this regard.

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Introduction

Vertical agreements can be simply defined as a formal contract among companies that are in different levels of production chains. It means that vertical agreements are not signed by companies that are competing in the same relevant market. A classic example of vertical agreements are the supply and distribution agreements. It is expected that companies will engage in those contracts to extract some benefit that they would not be able to extract without it. In other words, the contract will be successful when the interest of the parties involved coincide and they both profit from it. As we will see, this is not always the case, since one party might have market power and therefore better bargaining conditions towards the other.

Vertical agreements (in online or offline markets) have always been a paradoxical topic and constitutes one of the most dynamic disputes for antitrust enforcement. The reason for that is the fact that those alliances among companies can bring mixed effects on the competition process. On one hand they carry important economic efficiencies in the shape of cost savings to companies. On the other, they also bring about several anticompetitive concerns, such as risk of collusion or market foreclosure (in a form of selective distribution, geo-blocking, among others). These puzzled characteristics justify conflicting positions when it comes to their regulation.[2] Posner, for instance, discusses that the nature of vertical restraints makes it difficult to reach the ideal antitrust policy, in his words "how to enforce antitrust against practices that we are not prepared to treat (as we are in the case of price fixing) as entirely lacking in possible redeeming economic virtues".[3]

In terms of antitrust policy, it is very interesting to see how the policies and the jurisprudence have evolved in this regard in both sides of the Atlantic. For example, in the United States of America (US), for several decades, vertical restraints were considered as per se illegal. Nowadays the US Courts have been analyzing such agreements under the rule of reason, see for instance, the *Syvania*[4] case in 1970s about non-price vertical restraints, followed by *Khan*[5] case judgment for maximum resale price maintenance and recently and most significant

[2] Colino, S. M. (2010) *Vertical Agreements and Competition Law*: A comparative Study of the EU and US Regimes. Hart Publishing, at 1.
[3] Posner, R. (2005) 'Vertical Restraints and Antitrust Policy'. 72 *University of Chicago Law Review* 229, at 241.
[4] Continental TV Inc v GTE Sylvania Inc 433 US 36 and GTW Sylvania Inc v Continental TC Inc 537 F 2d 980 (9th Cir, 1976).
[5] State Oil Co v Khan (1997) 522 US 3.

the *Leegin*[6] case about minimum resale price maintenance. Actually, the *Syvania* case was a crucial decision as it was the first case to really establish the acceptance of the rule of reason and economic efficiency arguments to the analysis of vertical agreements. One of the explanations for this change in the American jurisprudence is, of course, the raise of Chicago School of thoughts, and the work of Robert Bork[7] or even Richard Posner.

In the European Union (EU), the evolution of policies oriented to vertical agreements, in general terms, also calls for an important reflection. The modernization of EU Competition policy in 2004 (with the publication of Regulation 1/2003) introduced two main changes in terms of enforcement of vertical agreements. The first change was the introduction of an ex-post control of any commercial agreements (including vertical agreements) in substitution of an ex-ante notification. Since then, parties do not receive the "green flag" from the authority to sign their agreements but they must reach their own conclusions on whether the agreement breaches Article 101 (1) of the Treaty on the Functioning of the European Union (TFEU) and if so, whether the Article 101(3) TFEU exemption applies. The second change was the decentralization of enforcement to national competition agencies and national courts to apply Article 101 of the TFEU. This means that, after 2004, the European Commission lost its monopoly to grant exemption to different agreements. In parallel to this process of modernization, the Vertical Block Exemption Regulation (VBER) was also updated in terms of adding more economic theory/ more concerns related to the economic efficiencies in each case.

Indeed, over the last decades, both the US and the EU have become more flexible towards vertical agreements and accepted that those contractual strategies can bring pro-competitive effects to markets rather than only anticompetitive concerns. The question I now raise is whether this shift to the application of the rule of reason or the sole ex-post control of vertical agreements should remain the same with the emergence of new types of contractual arrangements in online markets. In other words, *do the assessment of vertical contracts change with new interaction coming from e-commerce platforms or other networks*?; and therefore *how competition law can address the regulatory dilemma of vertical agreements that is reinforced with digitalization?*

[6] Leegin Creative Leather Prods v PSKS Inc 127 US 2705 (2007).
[7] See, for instance, Bock, R. (1978) *The Antitrust Paradox*: A Policy at War with Itself. Basic Books Inc. Publishers.

To answer to these questions, I recall the 1996 work of Frank H. Easterbrook[8] who used the term "law of the horse"[9] to critically define cyber law as a single niche of legal studies. According to his theory, cyberspace was an evolving world which was hard to understand and, consequently, to regulate it in detail. Because of that, he argues that individuals shall refrain from devising detailed regulation for each type of subject, leaving instead the resolution of specific disputes to the general rules of law. In stark contrast to this approach, Lessig claimed that detailed regulation is beneficial for cyber law and legal rules must evolve as the cyber space changes and develops.[10] The general issue at stake, set aside the particular role of cyber law, was the choice that law faces in dealing with a rapidly changing environment. More precisely, law shall decide whether to regulate in detail the newly developed environment or to merely leave the application of the general principles of law.

This scenario, however, is not a brand-new problem. The question as to the optimal design of an effective regulation comes in every time there is a radical transformation in society due to morality, technology, or economy. The discussion on how the law shall reflect these changes is actually an old story which dates back over 2,000 years. There are several examples on legal history that illustrate the normative responses to disturbances. For instance, the evolution of Roman law was triggered by diverse emergences of new legal demands that could no longer have adequate (and equitable) protection by the old body of law.[11]

In recent years, globalized markets and new business models have indeed raised questions on whether governments, regulators and entrepreneurs should reshape their approaches towards public and private governance. Generally speaking, new business models and digitalization are considered "disruptive" as they call for reconsideration customary commercial and contractual practices, principles of consumer protection, among several other traditional legal perspectives. These situations that result from innovations find a legislative gap that might directly affect different consumers, business people, organizations, and institutions. In fact, such *lacunae legis* covers an issue that had not even been thought by the legislator in several fields of

[8] Judge of the United States Court of Appeals for the Seventh Circuit.
[9] Easterbrook, Frank H. (1996). Cyberspace and the Law of the Horse, *University of Chicago Legal Forum*, 207-216.
[10] Lessig, Lawrence (1999). The Law of the Horse: What Cyberlaw Might Teach, *Harvard Law Review*, 113, 501-546.
[11] See for instance the discussion brought by Sanfilippo in Sanfilippo, Cesare (2002). *Istituzioni di diritto romano*, at 23.

law. It actually brings a challenge to law makers in understanding the new dynamics and therefore in establishing (or not) a new regulatory framework.

Competition law is also subjected to change according to the needs of society in this dynamic process and therefore antitrust enforcers are not exempted to think about new legal perspectives. Even knowing that digitalization is a broad topic, this paper focuses on policies oriented to vertical agreements.

The paper is organized in three main sections. Firstly, the paper presents the economic analysis of vertical agreements, both the traditional literature and the current academic debate involving the new forms of abuse on digital markets. This theoretical background is the first step in order to analyze *how* regulators can confront new forms of abuse of market power and *to what extent* is it desirable to create new regulation to the various problems associated with the rise of digitalization. The second section intends to present how different legal systems (US and EU) have been dealing with these issues. Finally, in the third section, the paper intends to bring an illustrative example of vertical restraints in online market recently judged by the European Court of Justice. The *Coty Case* discusses selective distribution systems in marketplace platforms.

In the attempt to highlight this discussion, the paper contributes with practical and theoretical references on the limits of economic power of innovation and digital markets; organizes information on economic and legal cases within the debate of national and regional specificities in a globalized context and; corroborates with new trends in Competition Law and Economics.

1. *The economic analysis of vertical agreements*

The economic literature understands that strategic alliances such as vertical agreements can strengthen both companies against outsiders even as it weakens one partner visa-vis the other.[12] Companies usually view each alliance as a window on their partners' broad capabilities[13]. They use the alliance to build skills in areas outside the formal agreement and systematically diffuse new knowledge throughout their organizations. Oliver Williamson[14] argued that these structures

[12] Massimo Motta. *Competition Policy: Theory and Practice.* Cambrigde (2004), at Chapter 6.
[13]Hamel, G., Doz, Y. L., & Prahalad, C. K (1989). Collaborate with your competitors and win. *Harvard Business Review*. January 1989.
[14] The transaction cost theory was first developed by Ronald Coase in 1937 with the publication of the book "The Nature of the Firm" and set the basis of the New Institutional Economics. Coase (1937) explained that a firm and a

derived from collaboration between companies can be called "hybrid forms" as this specialized governance structure deal with bilateral dependence without going as far as integration[15]. The key idea is that a bilateral dependency is strong enough to require close coordination but is not strong enough to induce full integration. Joint ventures, strategic alliances, franchising, distribution agreements, subcontracting can be used as examples of hybrid forms.

In several cases, cooperation becomes a low-cost route for competitors to gain technology and market access.[16] This is due to the fact that it requires high investments to develop new products and to penetrate new markets that few companies can go it alone in every situation. Firms sometimes need to collaborate with others in their markets with the aim of improving their performances. In principle, such agreements are not only beneficial but crucial to ensure proper channels to deliver goods to final consumers[17]. Vertical agreements have expanded in the context of globalization and digital economies where companies seek flexible and alternative ways of cost reduction. Companies have gradually aimed to cooperate with each other in a world where technologies are changing rapidly, markets are becoming global in scope, huge investment amounts are demanded to develop new products with ever-shortening life-cycles.

However, this cooperation might also bring about anticompetitive concerns. In general terms, the restrictions to competition imposed by vertical agreements can have two self-explained categories, price and non-prince restraints. Price restraints are restrictions imposed by the seller to the buyer, forcing this last one to observe certain price conditions for the reselling of the products or services. Non-price restraints are all other restrictions not directly related to prices, as consumer and territorial restrictions. Both price and non-price restraints can be further divided in three different groups: (i) when the seller commercialize its products exclusive to a specific buyer in a certain territory; (ii) when the purchaser decided not to buy goods from other

market are alternative means of organizing economic activity. He emphasized that transaction costs determine the market structure and shape transactions and inter-firm relationships, meaning that transaction costs explain the choice in favor of the market (decentralized governance) or in favor of the firm with its hierarchical and organizational structure (centralized governance). According to the author, transactions costs may broadly be described as search and information costs, negotiation costs and the costs of implementing and enforcing the agreements. In the 1970s, the transaction cost theory was further developed by Oliver Williamson, who imposes transaction costs considerations for the microeconomic price theory, thus being more of a complement to, instead of a substitute for price theory.

[15]See, for example, Williamson, O (1975). Markets and Hierarchies: Analysis and Antitrust Implications. New York: Free Press; or Williamson, O (1991).Comparative Economic Organization: The Analysis of Discrete Structural Alternatives. Administrative Science Quarterly

[16] Hamel et al, *supra* note 13.

[17] Colino, *supra* note 2.

suppliers and (iii) when limitations are imposed to resellers in terms of price, location or consumers. When discussing innovation in digital markets, some particular issues arise. On one hand, the fast-growing internet economy is leading to more efficient production and distribution of goods. On the other, despite the dynamic market interactions in the digital economy, there is a concern that successful digital firms might abuse their market power. [18]

Let's take as a practical example the e-commerce. The e-commerce guarantees easier access for retailers to customers and therefore customers deal with huge amount of information, lowering search costs and allowing better price-transparency. This means that the consumer does not have to leave his/her house and walk through all the reachable stores to make a price comparison of a certain product, he/she can simply go online and enter in the website of each store, or even easier, use the so called "marketplace platforms" or price comparison websites that make all the work easier. These factors directly result in greater price competition both online and offline sales and more intensive competition on brand, quality and innovation. However, in order to avoid this "fair" competition, the e-commerce can also create incentives to companies to engage in restrictive practices, for instance through imposing restrictive clauses in regular commercial contracts, e.g., encouraging selective distribution systems, marketplace bans, platform bans, price restrictions as resale price maintenance, geo-restrictions, among other vertical restrains. In those cases, even knowing that the consumers in theory have access to information, they cannot reach the product.

As said before, vertical agreements have always been a paradoxical topic and constitutes one of the most dynamic disputes for antitrust enforcement, since a great deal of uncertainty exists about whether a practice infringes the law. The economic analysis of competition policy, price and territorial restrictions embrace an exhaustive study of the rules for vertical agreements. For this reason, an economic analysis is crucial, and even knowing that antitrust authorities around the world have different ways to deal with the matter, they shall not overlook the importance of it.

2. *Different antitrust approaches towards vertical agreements*

This section aims at briefly analyzing the American and the European antitrust policies oriented

[18]For more details, see Final report on the E-commerce Sector Inquiry, published by the European Commission on May 2017.

to vertical agreements. I will present their core policies and the measures that have been taken to assess the impact of digitalization in those commercial alliances.

As already highlighted above, in the US, for several decades, vertical restraints were considered as per se illegal. Afterwards, US antitrust has mostly moved from mistrust to tolerance towards these restrictions.[19] In a historical perspective, back in 1890, the Section 1 of the Sherman act establish prohibition of restrictive agreements: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint to trade or commerce among the several States, or with foreign nations, is declared to be illegal". Actually, the US Supreme Court has occasionally explained the per se rule as following:

> "[…] Certain agreements or practices which, because of their pernicious effect on competition and lack of any redeeming virtue, are conclusively presumed to be unreasonable, and therefore illegal without elaborate equiry as to the precise harm they have caused or the business excuse for their use."[20]

It took more than 80 (eighty) years to change this rationale in American courts. Actually, the *Syvania* case in the 1970s was a crucial decision as it was the first case to really establish the acceptance of the rule of reason and economic efficiency arguments to the analysis of vertical agreements. This new approach towards vertical restraints was reinforced by several other cases, which I highlight the *Khan*[21] case judgment for maximum resale price maintenance and recently and most significant the *Leegin*[22] case about minimum resale price maintenance. Colino discusses that the change to the application of rule of reason is very much related to the raise of the Chicago School of thoughts. In this sense, she explains:

> "Nowadays the US has a long, solid tradition of competition law based on economic analysis. The regulation in the US evolved depending on the predominant economic theories of the specific time. […] Currently, under US antitrust law, the protection of inter-brand competition is prioritized, and firms are allowed to impose restrictions to competition in their own product. Territorial restraints and limits to intra-brand competition are presumed to have efficiency-enhancing effects for firms, while at the same time they do not impose a serious threat for consumers. Competition between

[19] Colino, *supra* note 2, at 35.
[20] Case Northern Pac R Co v US 556 US 1 (1958).
[21] State Oil Co v Khan (1997) 522 US 3.
[22] Leegin Creative Leather Prods v PSKS Inc 127 US 2705 (2007).

> competing brands is what encourages the efficient allocation of resources, as it is the cause of the maintenance of low prices and bread choice for consumers [see Business Eletronics Corp v Sharp Eletronics Corp 485 US 717 (1988)]. […] Vertical agreements are considered an essential incentive to enter into distribution contracts, as otherwise the risk of free-riders could deter distributors from incurring in the necessary costs. However, this was not always the view, and current tendency in US antitrust in the result of its extensive experience, gathered over more than a century, and the influence of the prevailing economic theory of the moment, which have determined the goals pursued by the policy."[23]

As of 2000, the Federal Trade Commission and the American Department of Justice published an "Antitrust Guidelines for Collaborations Among Competitors".[24] From the Guideline it is clear that commercial agreements (i.e. non-price and price restraints) that are not challenged as *per se* illegal (e.g. price-fixing, client's division) are analyzed under the rule of reason to determine their overall competitive effect. The U.S. agencies' analysis of the competitive effects of vertical restraints turns on an evaluation of case specific evidence, consistent with existing case law, informed by insights from the economic literature on vertical restraints.

Because the American Guideline is from the 2000s, it has not been updated in regard to collaboration coming from innovative and digital markets. Actually, in 2012, the US antitrust agencies requested a roundtable on Vertical Restraints for Online Sales in order to answer to questions such as "*Does the development of e-commerce call for an overall revision of the indications contained in guidelines and other policy documents, or can they be easily applied to the new economic and technological setting?*". However, the conclusion addressed that the agencies do not see a need to develop specific rules for their analysis of vertical restraints in markets with online sales.[25]

Different from the US, where the evolution of policies was reflected by the schools of thoughts, in the EU, the policies mostly over relied on what the Commission defined as policy

[23] Colino, *supra* note 2, at 47-78.
[24]Available at: https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf
[25] For more details, please see: OCDE (2013). Roundtable on vertical restraints for online sales. Available at: https://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-and-other-international-competition-fora/1302verticalrestraints-us.pdf

goals. Since the 1960s, when Regulation 17/62 was established, vertical agreements were, as a consequence of the broad definition of restriction on competition and the integrationist approach, considered to fall within the old Article 81 (1) EC. Therefore, there was a large demand for exemptions on the basis of Article 81 (3), which provided exemptions for potentially beneficial restrictions. Although only a few agreements actually aimed at restricting competition, business people were subjected to the notification system, where they applied for an individual exemption for each of those agreements. The high administrative costs of the notification regime of agreements was one of the motivations behind the Modernization of EU competition policy.

Since the Regulation 1/2003 entered into force the EU competition regime is based on *self-assessment of commercial contracts*, i.e. the parties must reach their own conclusions on whether the agreement breaches Article 101 (1) of the Treaty on the Functioning of the European Union (TFEU) and if so, whether the Article 101(3) TFEU exemption applies. To help the adaptation from the ex-ante notification system to the self-assessment of parties, the Commission has published a series of Guidelines and Block Exemptions, which in effect provide safe harbors to the contractual parties.[26]

According to the EU law, if the terms of the commercial agreement fit within the parameters of the block exemption, and the parties to the agreement are within the market share thresholds specified by the block exemption, then the parties can assume that the provisions of that particular agreement will not fall within Article 101 (prohibition of anticompetitive agreements). In 2010, the European Commission adopted a new/ updated version of the Vertical Block Exemption Regulation (VBER) which exempts certain distribution agreements, among others, from competition law rules prohibiting restrictive agreements.

The European Commission has been quite open in terms of defining the potential anticompetitive effects of the new digital economy. On May 2017, the European Commission published their final report about the E-commerce Sector Inquiry, exemplifying what kind of anticompetitive contracts (or contractual clauses) are more likely to be observed when thinking about agreements in the e-commerce sector. Even knowing the Commission concluded that there is no need of updating again the VBER on the bases of the restrictions coming from e-commerce, they bring an extensive study that certainly will help business people, lawyers and law enforcers to better assess contracts resulted from online sales.

[26] Whish, R., & Oxon, B. A. B. C. L (2014). *Competition Law*. Oxford Press.

Another example of the Commission's efforts towards digitalization is the new regulation about geo-blocking, as part of the digital single market strategy.[27] In March 2018, the European Commission published Regulation (EU) 2018/302, to enter into force in all member states in December 2018, that addresses unjustified online sales discrimination based on customers' nationality, place of residence or place of establishment within the internal market. According to the Commission, geo-blocking and other geographically-based restrictions undermine online shopping and cross-border sales by limiting the possibility for consumers and businesses to benefit from the advantages of online commerce. As of 2015, a Commission survey found that only 37% of websites actually allowed cross-border customers to reach the final step before completing the purchase by entering payment details. The fact that the geo-blocking goes in an opposite direction of the goals of EU integration, the Commission decided to adjust their regulation as a consequence of digitalization.

Apart from what has happened in the US and in the EU, other jurisdictions – with less tradition in competition law – have also been struggling with the regulatory dilemma brought by verticals, mainly in the digital era. In Brazil[28], for example, the Brazilian Antitrust Agency (CADE) have been recently discussing and changing the policies of commercial agreements. It is possible to identify three main recent changes in legislation: (i) the new Antitrust Law (No. 12539/2011) that foresaw the mandatory filing for commercial contracts, without clarifying the concept of "commercial agreements" or specifying the conditions for notification; (ii) the Resolution No. 10/2014 which was the first regulation that tried to clarify the conditions for notification for both horizontal and vertical agreements; and (iii) the Resolution No. 17/2016, which is the second regulation that tried to clarify the rules by removing the vertical relationship threshold for notification, for instance, in supply and distribution agreements.

Different from what has been done in the EU, the Brazilian authority changes the notification system of vertical agreements without implementing complementary policies, as such, self-assessment guidelines or any time of exemptions. For this reason and in the context of new forms of abuses coming from the digital economy, it is questioned whether these recent reforms significantly improved or worsened the enforcement of antitrust enforcement in Brazil,

[27] For more information on the EU's new digital single market strategy, please check: https://eur-lex.europa.eu/summary/EN/3102_3 [31-05-2018].

[28] The choice of the country is not only due to my personal origin. I believe that the recent changes in national legislation oriented to vertical agreements bring important understandings that can be shared with other jurisdictions that face similar political, institutional, economic and social conditions.

in particular the enforcement of vertical restraints.

This section aimed at analyzing what has been discussed in terms of policy to vertical agreements as a result of digitalization and the interaction of online markets and platforms. I briefly described that the policy in the US has changed towards the application of the rule of reason and this is mostly because of the evolution of economic schools of thoughts. This means that digitalization in the US only reinforces the need of carefully assess the economic analysis of new business models and markets rather than necessarily change the way enforcement has to be conducted. In the EU, the scenario is somehow different. Even knowing that the Commission opted to not adapt their VBER as a consequence of digital markets, some other measures have been taken to avoid futures abuses, such as the geo-blocking regulation. Also related to the EU experience, next section briefly describes one case of vertical restraints in online markets that had brought about interesting discussions among academics and practitioners.

3. *Online marketplaces and the Coty Case*

In December 2017, the European Court of Justice (CJEU) confirmed that the luxury cosmetic supplier *Coty Germany GmbH* ("*Coty*") did not break competition law when it prohibited one of its authorized distributors, *Parfümerie Akzente GmbH* from selling *Coty*'s products in third-party platforms such as *Amazon* or *E-bay*. This recent jurisprudence calls for a reflection whether the era of e-commerce modifies the way competition law shall be applied to cases involving selective/exclusive distributions. The section aims at first presenting the law and economics rationale of selective distribution, and then it concisely presents some important European Union (EU) cases law in this matter, highlighting the *Coty* case and its implications.

Briefly speaking, selective distribution is characterized when a certain supplier is engaged in agreements with a limited number of selected dealers. In most cases of selective distribution, the dealer must comply with several particular characteristics to be entitled to sell the products. For instance, the retailer shop should be located in a famous street, being specialized, having dedicated personal, having specific décor and furnishing, among other characteristics. Motta explained that by seeking selective distribution, the suppliers aim at preserving the brand's image (mainly in case of luxury goods); avoiding free-riding problems and other opportunistic behavior and; promoting specific investments, mainly in cases of long-term contracts. [29]

Apart from these economic efficiencies, Competition Law & Economics literature analysis that exclusive distribution may also result in anticompetitive effects[30], such as limitation of inter-brand and intra-brand competition (meaning that consumers will deal with less available options of certain products/brands); creation of entry barriers in certain markets; or even market foreclosure. Moreover, when both suppliers and dealers have market power, there is also a risk of double-marginalization leading to high prices to final consumers.

As explained in the previous Section, overall, under EU Law, selective distribution falls outside the prohibition of Article 101(1) Treaty of the European Union (TFEU). However, three conditions shall be satisfied in order to tackle the potential anticompetitive concerns of those agreements: (i) the nature of the product in question must necessitate a selective distribution system; (ii) manufacturer shall choose their resellers based on objective criteria of a qualitative nature and (iii) the criteria laid down must not go beyond what is necessary.

In this context, it is important to mention two EU cases involving selective distribution over the years: (i) Case 26-76 *Metro v Commission and* (ii) Case 439/09 *Pierre Fabre v L'Autorité de la concurrence* (France). The first case is particularly important because it introduced the "criteria" for allowing selective distribution agreements under EU Law. Different from the *Metro* case, in the *Pierre Fabre* case, the European Court of Justice decided that a general and absolute ban on internet sales in the context of a selective distribution network constitutes a restriction of competition by object within the meaning of Article 101(1) TFEU. Moreover, this decision also defined that selective distribution agreements containing such a ban could not benefit from the provisions of the Vertical Restraints Block Exemption Regulation ('VBER'), although they could benefit under certain condition from an individual exemption under Article 101(3) TFEU. Even knowing that the *Pierre Fabre* case did not involve luxury goods, it brought significant confusion as to whether selective distribution agreements infringed Article 101(1) TFEU. Following the *Metro* case decision of 1976, the CJEU in December 2017 decided that selective distribution system for luxury goods, designed primarily to preserve the luxury image of those goods, does not breach article 101 TFEU.

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[29] Motta, Massimo (2004). *Competition Policy: Theory and Practice.* Cambridge, at 334.
[30] Van den Bergh, Roger (2017). *Comparative Competition Law and Economics*. Elgar, at 262.

Historically, *Parfümerie Akzente* distributed *Coty*'s products both in physical stores and via online platforms, such as their own website and other online marketplaces such as the amazon.de. In 2012, *Coty* proposed to *Parfümerie Akzente* to include a provision in their distribution contract prohibiting Parfümerie Akzente from selling *Coty*'s products third-party websites, such as *Amazon* or *E-bay*. As those market places were commercially important for *Parfümerie Akzente*, they refused to accept the amendments of the contract. Consequently, *Coty* brought an action in the German courts. Following *Pierre Fabre* case, the *Oberlandesgericht Frankfurt am Main*, Regional Court of Frankfurt rejected *Coty*'s application, arguing of infringement of Article 101(1) TFEU. *Coty* appealed this decision to the Higher Regional Court of Frankfurt, who requested the CJEU to rule on whether the restriction by a luxury brand owner on the use of third-party marketplaces websites online infringes Article 101 (1) TFEU.

The CJEU responded to the referred questions by confirming that luxury brand owners are permitted to restrict the use of third-party online platforms, following mainly what is described in the European Commission's guidelines on vertical restraints. It means that certain criteria shall be met, such as (i) that selective distribution clause has the objective of preserving the luxury image of the goods in question; (ii) it is laid down uniformly and not applied in a discriminatory fashion; and (iii) it is proportionate in the light of the objective pursued.[31]

In addition, in *Coty* judgment, the CJEU underlines the importance of non-price aspects of competition, mainly when it related to luxury goods, and confirms that selective distribution arrangements are "*a necessary and proportionate method of protecting those non-price aspects*". Regarding the *Pierre Fabre*, the CJEU clarified that in agreements involving non-luxury goods, an effects-based analysis of the industry and the market would be required in order to determining whether such an arrangement is within the scope of Article 101(1) TFEU.

This case calls for a reflection whether the jurisprudence of European Court of Justice has evolved as consequence of digitalization. We have seen that in cases of selective distribution, the application of law and economics concepts were the same both in Coty case from 2017 or Metro case from 1976 (more than 40 years ago). This means that even knowing new business models have been constantly challenging the legal traditions, antitrust authorities might still merely leave

[31] Court of Justice of the European Union. Judgment in Case C-230/16. Coty Germany GmbH v Parfümerie Akzente GmbH. Luxembourg, 6 December 2017.

the application of the general principles of law and economics, or the rule of reason approach, instead of putting effort in regulating in detail the newly developed environment.

4. Conclusion

The proposed paper expands the academic discussion regarding the new competition-related concepts and challenges created by the digital economy. If we go back to the proposed questions *do the assessment of vertical contracts change with new interaction coming from e-commerce platforms or other networks*? and *how competition law can address the regulatory dilemma of vertical agreements that is reinforced with digitalization?*, one can conclude that there are still an extensive space for further research.

On one hand authorities have been skeptical in adjusting their enforcement policies in both sides of the Atlantic, since the economic analysis of vertical agreements (and therefore the self-assessment) shall consider already the particularities of those new business models. On the other, agencies might be misleading important characteristics of new business models that play a big role in the competition process.

As a result, our attempt was to demonstrate that the discussion of antitrust policies oriented to commercial agreements is still relevant worldwide and should be carefully assessed by antitrust authorities in order to guarantee better legal certainty to parties and therefore optimal enforcement levels.