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POTENTIAL IMPACT OF THE FAMOUS PIERRE FABRE CASE ON E-BUSINESS IN THE EU – THE EUROPEAN SECRET MESSAGE ABOUT THE SIGNIFICANCE OF DOMAIN NAMES

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Abstract
Three years have passed since the famous decision of the European Court of Justice *C-439/09 Pierre Fabre* which shed new light on the area of online distribution. Conventionally, this case is presented as a hallmark and touchstone regarding the evolution of the approach of the European Commission and Court of Justice of the European Union to vertical contractual arrangements involving intellectual property and, allegedly, as a guidance for the assessment and evaluation of selective distribution systems based on Art. 101 of the TFEU. However, the entire *Pierre Fabre* case has more layers, deals with conceptual issues of a more economic approach as well as with the general EU attitude to e-commerce, etc. The forensic and investigative employment of well accepted sources from related areas is instructive, namely the exploration of an (anti) competition case about online distribution, *Pierre Fabre*, which is informative about the perception of domain names by the EU organs. The goal of this article is to explore, through meta-analysis, points which are extremely valuable for business conduct in the EU, such as the indirect and implied recognition of the function and importance of domain names for e-advertising, e-marketing and even e-commerce in the EU. In addition, it indicates that the cutting of this competition law Gordian knot was done based on imperfect knowledge about IS/IT and is hardly reconcilable with the Europe 2020 Initiative.

Keywords
Domain Name, E-Business, European Union, On-line Distribution, Pierre Fabre Case, Vertical Restrictions.

JEL Classification
D86 , K21, L21, L42, O32, O34.

1 Introduction

Information systems and information technologies ("IS/IT") are hallmarks of our post-modern, global society and successful business conduct depends strongly on their appropriate use. The *platform par excellence* for e-business, and in particular e-commerce, is the supra net of e-nets, the Internet (MacGregor, 2013). Structurally, the Internet is hierarchically composed of large domains called Top Level Domains ("TLDs"), while each of the TLDs includes a number of domains carrying domain names. Technically, a domain is the e-sphere around one or more e-devices, typically computers, sharing a common communications address expressed as a code under Internet Protocol, either in 32 bits version 4 or in 128 bits version 6 using 8 groups of 16 bits separated by a double column ":" (MacGregor, 2012a). Thus, a domain is an e-platform for a set of related web pages called a web site, which is hosted on at least one web server accessible via the Internet or a private local area network ("LAN"). All publically accessible web sites constitute the World Wide Web and they, resp. their domains, have a numeric code IP v4 or IP v6 address convertible through the Domain Names System ("DNS") into a verbal form called domain names. The practical implication is that virtually all businesses in the EU use the Internet and are present on the Internet, i.e. typically they "have" at least one domain with a preferably attractive domain name and they use it for their web site, i.e. for the their e-business and especially its selling oriented part, e-commerce. Businesses clearly rely on customers shopping online and e.g. more than 10% of all retail sales are made over the Internet in several EU member states and by 2020 this proportion should double (Gilbert, 2013).

There are insignificant differences in the perception of the impact of domain names on e-commerce from the perspectives of businesses in the EU, but there are still important differences in perceiving the impact of domain names on e-commerce from the perspective of customers in the

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EU (MacGregor, 2013). There are emerging trends regarding the preferences of businesses from the EU regarding the ideal TLD for their domain and web site (MacGregor, 2012b).

The EU is aware about the importance of IS/IT for a sustainable development and a stronger integration and makes it clear that the e-format is vital for the single internal market and helps to make the EU rank among the top two or three most competitive and dynamic knowledge-based economies in the world, if not at the actual forefront. The underlying concepts, which followed the priorities and wording of the Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce in the Internal Market ("Directive on e-commerce), can serve as an example *par excellence.*

For the European integration, the success of the internal market is critical. Thus, the EU, especially its integration engines, the European Commission and the Court of Justice of the EU, are vigorously supporting instruments promoting the single internal market and appropriate competition on it and fighting against instruments hurting and hampering the internal market and unduly restraining competition on it. One of the principal reasons is the commonly shared opinion that appropriate competition encourages businesses to offer consumers goods and services on the best terms, to be more effective and efficient, to engage in innovation process' and to try to reduce prices and increase quality. The protection part of the EU competition policy, the EU antitrust policy, rests on two pillars explicitly proclaimed in the primary EU law, i.e. Art. 101 and Art. 102 of the Treaty on the functioning of the EU ("TFEU") with a consolidated version published in the Official Journal C 326 , 26/10/2012 P. 0001 - 0390.

The general prohibition is set by Art. 101 (1) TFEU, which prohibits agreements or collusion by two or more businesses, which may affect trade between Member States and which have as their object or effect the restriction of competition within the internal market. This ban targets especially horizontal cartel agreements fixing prices, with the infamous Resale Price Maintenance ("RPM") clause or splitting the market. The individual exemption from the general ban is set by Art. 101 (3) TFEU, which allows for escaping the application of Art. 101(1) TFEU if four cumulative conditions laid down in this provision are met. Art. 102 TFEU prohibits the abuse of a dominant position. The European Commission is empowered with large duties in this arena, nevertheless modern EU antitrust law is decentralized and a delegation *sui generis* to national antitrust authorities is established.

The Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, newly Art. 101 and Art. 102 TFEU („Regulation on the implementation of antitrust rules") explicitly states in Art. 1(2) that agreements, decisions and concerted practices caught by Art. 101(1) TFEU which satisfy the conditions of individual exemption pursuant to Art. 101(3) TFEU are not prohibited and that no prior decision to that effect is required. According to Art. 2 of the Regulation on the implementation of antitrust rules, the burden of proof with respect of Art. 101(1) TFEU rests on the party or authority alleging the infringement, typically the European Commission or the national antimonopoly office, while the burden of proof with respect of Art. 101(3) TFEU is borne by the business claiming the benefit of the exemption. Art. 3 of the Regulation on the implementation of antitrust rules specifically covers the application of national competition law along with EU competition law by national authorities and courts. In addition, according to Art. 3(2) of Regulation on the implementation of antitrust rules, the application of national competition law may not lead to the prohibition of agreements which may affect trade between Member States but which do not restrict competition within the meaning of Art. 101(1) TFEU, or which fulfill the conditions of Art. 101(3) TFEU. Further, the Commission Regulation (EU) No 330/2010 of 20 April 2010 provides a block exemption from the application of Art, 101(1) TFEU to vertical agreements, which do not cover more than 30% of the relevant market, which do include hardcore restrictions, and which are entered into by businesses with a total annual turnover not exceeding EUR 50 million.

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With respect to the interpretation and application of Art. 101 and Art. 102 TFEU and related provisions from EU primary, secondary, and even supplementary law, there is an ongoing discussion about models and schools to be followed or rejected, about post-Chicago lines as well as ordoliberal lines, but there are not any doubts that the EU antitrust law dominates the scenery and the antitrust law of EU members mirrors it. Thus, ultimate decisions in cartel cases by the CJ EU have the potential to become EU as well as national precedents. Exactly so is the instance of the decision in *C-439/09 Pierre Fabre*, which is heavily quoted and commonly presented across the EU as a decision clearly prohibiting the inclusion of a clause banning online sales into vertical agreements. Reportedly, according to *C-439/09 Pierre Fabre* by operation of Art. 101 (1) TFEU, a manufacturer is not allowed to agree with its selected distributors that they will not use online sales of the product, unless the public law requires sales in brick-and-mortar premises and/or in the presence of professional experts, e.g. medications in a pharmacy. Occasionally, some comments deal as well with the *C-439/09 Pierre Fabre* impact on the interpretation and application of the exemption included in Art. 101 (3) TFEU, i.e. whether the prohibition of such online ban clauses cannot be overcome via a block exemption for vertical agreements.

However, *C-439/09 Pierre Fabre* as a precedential and further referred post-Lisbon Treaty case of the CJ EU means much more, because it shows the critically important insight and attitude of the CJ EU towards e-business, domain names and their significance, i.e. it indicates with a strong likelihood *quo vadis* of EU and EU law. The capacity of the CJ EU to steer the wheel and to determine the legal framework and evolution, e.g. while using the self-made doctrine of supremacy and direct effect, is famous, but it is famous also for its unwillingness to rethink and to review its previous positions (Svetlicinii, 2011). This was, once more, recently confirmed with respect to the reform Lisbon Treaty and the competition. The Lisbon Treaty suppressed the 50-year-old commitment regarding the *"undistorted competition*" and, due to the French request, pushed it from Art. 3 into the Protocol No 27. This opened discussions about whether the principle of undistorted competition is out and whether the move means an efficiency-based reconstitution of competition law doctrine stressing the consumer welfare. The CJ EU, as so often in the past, did not hesitate to step in and to make it clear in a number of post-Lisbon decisions that the principle remains without any change regardless of the legislative move, and that a restraint of competition requires no more than harm to the competition structure regardless of any (lack of) impact on the consumer welfare (Van Rompuy, 2011). Undoubtedly, the CJ EU was, is, and will be a pro-integration active EU organ, which shapes the EU law scenery with an extremely high consistency.

In *C-439/09 Pierre Fabre*, a myriad of highly interesting and even controversial arguments regarding IS/IT were advanced by the Advocate General, J.Mazak, and by the Third Chamber of the Court presided by K. Lenaerts and considering the power and consistency of the CJ EU, they can soon become (un)official rules to be observed. Certainly, *C-439/09 Pierre Fabre* is a precedent with a *ratio decidendi* about the understanding and application of Art. 101 TFEU and related provisions and rules about the vertical distribution agreements trying to avoid online sales. Nevertheless, a forensic critical study with Meta-Analysis elements can demonstrate that many arguments and conclusions about IS/IT in *C-439/09 Pierre Fabre* have the potential to be much more than a mere *obiter dictum*. Almost three years have expired after the issuance of *C-439/09 Pierre Fabre*, while the richness of its insight in the IS/IT was ignored even by the academic and professional public. Such a situation is deplorable, especially considering the massive importance of e-business, the importance of IS/IT which is well recognized by the EU, and the reduced amount of special policies and rules dealing with IS/IT, including domain names, in the EU. Unambiguously, the *C-439/09 Pierre Fabre* implies a rather unexpected perception of Internet domains, domain names and their significance for business by the CJ EU and thus constitutes a unique opportunity to address it, i.e. to change our practice to comply with it or to try to correct it so it is reconciled with the manner in which business is truly done in the EU. In sum, *C-439/09 Pierre Fabre* is a unique and, so far, over-

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looked resource with a dramatically important and controversial impact on the EU, European integration and the manner of e-business, especially e-commerce, in the EU.

2 Methods

A major task in all areas of science is the development of theory and theoretical concepts (Schmidt, 2014), especially if only a limited amount of sources and information is available, it is critically important to select the most appropriate methods in order to research them and explore their full richness.

Methodologic basis and points of departure for studies involving legal aspects must include both deductive and inductive aspects of legal thinking (Matejka, 2013), because legal theoretic orientation reflects the legal science which is not axiomatic but argumentative (Knapp, 1995). It is obvious that the legal regulation of competition, intellectual property and IS/IT is not a static postulate field, but a dynamic argumentative with a potential for conflicts between well recognized principles and priorities. Thus the appropriate argumentation must come out from an objective observation and scientific interdisciplinary study and strongly apply various balancing and continuously changing tests. The argumentation itself must be not only rational, but as well ethical and mirror the scientific modesty (Knapp, 2003) which naturally is not in contradiction with the requirements of scientific courage and honesty (Matejka, 2013).

Both traditionally and conventionally, the quantitative approach and the qualitative approach are distinguished. Customarily, quantitative research and analysis relies on mathematically measurable values. The study of *C-439/09 Pierre Fabre* based on the available opinion of the Advocate General and the judgment given by the judges from the CJ EU and the extraction of semi-conclusions for IS/IT can just marginally be done by quantitative methodology and only peripherally use deduction to determine and assess, based on the collected data, what, when, how much, and how likely a phenomenon occurs, but not why.

The exploration of *C-439/09 Pierre Fabre* is much more investigative and argumentative and inherently entails the qualitative analysis, which rather inductively assumes and confronts with such assumptions collected data and explains why and how the original theoretical assumptions should be modified. Hence, the hypothesis for the qualitative search is an instrument for interpretation, not a tested subject matter to be confirmed or rejected. Particularly for *C-439/09 Pierre Fabre,* the dominant qualitative approach should target two potentially conflicting areas – comparative confrontation and reconciliation. Since the opposition between qualitative and quantitative methods should not be overplayed, and at the same time the confrontation-reconciliation attitude is suggested for *C-439/09 Pierre Fabre*, quantitative methods should not be avoided (Silverman, 2013). On the contrary, it is vital to employ the Meta-Analysis methods, which are known for their focus on contrasting, combining and reconciling data and results from different studies in order to identify patterns, relations, and relationships. Meta-Analysis is founded upon the conviction that there was discovered, exposed, more than what was understood and presented as the official results. It is a scientific research about broad research outcomes and constitutes a refreshing and important component of a systematic review procedure, and thus it is a welcome set of methods critically combining evidence of a predominantly numeric nature. Plainly, Meta-Analysis is an analysis of analysis, it is a rigorous alternative to the casual, narrative discussions of research studies which typifies efforts to make sense of the swiftly expanding research literature. (Glass, 1976)

In *C-439/09 Pierre Fabre*, instead of various studies, the Meta-Analysis treatment will address the outcome of the analysis performed by the Advocate General and judges and advanced in the opinion of the Advocate General and in the ultimate judgment. The results will be critically confronted with the publicly available data about IS/IT and their correctness will be assessed.

In addition, considering the very particular field of competition law, intellectual property and IS/IT, especially their overlapping, it is valuable to employ investigative forensic study cases and to

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give to the term *forensic* its original meaning, i.e. legal as related to courts and thus in Latin *before the forum* (Anderson, 2008). Forensics means the application of scientific methods relative to objective empirical observation and to evidence gathering via data analysis, and testimonial recommendations. Typically, the case study method is a type of the application employed in relation to forensics, such as the study of the *C-439/09 Pierre Fabre.*

As correctly pointed out, we often do not exploit gold mines of information included in our sources, because we employed predominantly narrative review methods with respect to more or less arbitrarily pre-selected sources (Glass, 1976). We definitely need to improve our methods for synthesizing and integrating sources and data, especially in the case of judicature (Schmidt, 2014).

Thus regarding *C-439/09 Pierre Fabre,* the first hypothesis is that statements and arguments about IS/IT, especially domain names, in the opinion and judgment contradict each other, can hardly be reconciled with each other and do not reflect the current role and function of IS/IT, especially of domain names. The second hypothesis is that the EU and EU law are both undergoing an evolutionary, if not revolutionary, change in their perception and attitude towards the Internet.

3 Results and discussion

A systematic analysis of the meaning of *C-439/09 Pierre Fabre* for IS/IT, especially of its significance for e-commerce via Internet domains, relies on three key sources to be consecutively explored and ultimately confronted and, if possible, to reconciled – the opinion, the judgment and the aftermath judicature and academic literature.

3.1 Statements and arguments about IS/IT advanced in the Opinion of Advocate General J.Mazák delivered on 3rd March 2011 in *C-439/09 Pierre Fabre*

The opionion of the Advocate General in *C-439/09 Pierre Fabre* was delivered by Prof. Ján Mazák, born in 1954, originally the Slovak professor of civil law, later on the professor of Community Law and who has served for many years as a judge of various Slovak national courts. He was an Advocate General at the CJ EU from 2006 to 2012. This background information is highly illustrative for the analysis of the „IS/IT" parts of his opinion. Manifestly, the opinion was delivered by an expert on Civil Law and EU law, an experienced national judge and definitely not a raw beginner at the CJ EU. At the same time, certain doubts may *prima facia* arise regarding his mastery of IS/IT, his hands-on experience with e-business and his appreciation of the management of domains, domain names and web sites. Undoubtedly, Prof. Mazák excellently addressed many competition and antitrust issues in *C-439/09 Pierre Fabre,* however, the following analysis will cover exclusively a set, seemingly fragmentary, of his statements, arguments or even conclusions going to the very heart of e-business.

In point 19. of the opinion in *C-439/09 Pierre Fabre,* it is mentioned, with reference to a statement of the Pierre Fabre Dermo-Cosmétique SAS („PFDC") that, given the very high level of intra-mark competition resulting from the 23 000 outlets in France, an *in concreto* examination shows that the object of the agreement is not to restrict competition. In point 38 of the opinion there is repeated the PFDC argument that the ban regarding online sales is objectively justified by the major risk of an increase in counterfeited products due to Internet sales, by the resulting dangers for consumer health, and by the risk of free-riding which could lead to the disappearance of the services and advice provided in pharmacies, as the owners of internet sites could free-ride on the investments of distributors who do not have such sites. PFDC actually developed this argument further by suggesting that, due to the ban, consumers know that any products sold with PFDC´s brand via the Internet are counterfeit. Accordingly, no Internet domain, regardless of its name or use, should become a forum to get PFDC products, and, as a result, the potential for parasitism or confusion via Internet Domains should be reduced to zero.

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This PFDC argument was ragingly rejected by Prof. Mazák, despite his recognition of counterfeiting issues on the Internet and in e-business. As a matter of fact, the wording used by Prof. Mazák is more than surprising. Although he stated in point 39 that the threat of counterfeiting and the risk of free-riding are valid concerns in the context of selective distribution, he followed in point 40 with a peculiar statement:"*However, I am uncertain how the distribution by a selected distributor of a manufacturer's products via the internet could itself lead to an increase in counterfeiting and how any detrimental effects resulting from such sales cannot be counteracted by adequate security measures*." Sadly, a multitude of consumers from the EU can testify about how easy it is to get confused by a pretentious web site under domain names strongly suggesting that they are operated by the true and genuine beneficiary of trademark protection, and that the online offered products are not counterfeit. Ironically, PFDC is active in a business with superior quality cosmetic products and this is one of the very popular fields for attack by online experts in the placing and selling of counterfeit products.

Even more sadly, Prof. Mazák went on, and in point 40 of his opinion continued:" *As regards the question of free-riding, given that the setting-up and operation of an internet site to a high standard undoubtedly entails costs, the very existence of free-riding by internet distributors on the investments of distributors operating out of a physical outlet cannot be presumed*." The following tables shows that obtaining a domain name, arranging for a domain and creating, plus operating, web sites for e-business is financially insignificant, the annual costs are generally way under 1% of the annual turnover of even small and medium size enterprises.

Table 1. Domain Names Price Comparison

Top Level Domain	Registration of domain name	Renewal
.biz	USD 5	USD 7
.com	USD 5	USD 8
.eu	USD 5	USD 7
.in	USD 3	USD 9
.me	USD 7	USD 8

Source: domparison.

Manifestly, the initial investment in the registration of a domain name through a Registrar in a Registry of a TLD attractive for e-business is insignificant. Similarly, the annual renewal fee is insignificant.

Table 2. Web Hosting Companies Comparison

Company offering web hosting	Price	Rating based on space, traffic, speed
GoDaddy	USD 1	9.7
inMotion	USD 2	9.7
BlueHost	USD 4	9.7
HostMetro	USD 2	9.4
Dreamhost	USD 9	9.2

Source: findmyhosting.

Clearly, the "renting space" for the label, i.e. getting web hosting for the domain under a domain name, can be done for a very marginal cost.

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Table 3. Costs for building/designing a web site

Author of Web Site	Cost	Comments
Yourself-WorldPress	free or under USD 1	Template
Local Designer using template	USD 200	Adjusted for you
Local Designer doing ad hoc for you	USD 1 000	Done for your
Local Designer Company	USD 2-5 000	Done for you
Famous Design Experts	Over USD 5 000	Superior copyright work

Source: own elaboration.

Obviously, there are many options about how to design and build a web site, and it can be done free of charge as well as for hundreds and even thousands of USD. At the same time, it seems unlikely to have to spend over USD 10 000 to have a high quality web site for e-business, and if the business has an IT specialist, then the cost of web site design can be reduced, if not eliminated. In addition, Registrars are truly competing for clients and thus they offer various monthly package plans which include all three elements presented in Table 1, Table 2 and Table 3, i.e. domain name+web hosting + web site design for USD 6-15 monthly.

Therefore, the argument of Prof. Mazák in point 40 of his opinion, that the costs for setting-up and maintaining an Internet site are so high that the free-riding by Internet distributors on distributors operating brick-and-mortar shops cannot be presumed, is self-defeating, and must be rejected. Certainly, a web site for e-business presented within a domain with an attractive domain name are assets with a value. However, such a value streams predominantly from the worth of a domain name, and if a business does not want a unique domain name which is already registered for somebody else and is open to get a variation of it, then it can get the entire package for less than USD 10 000 for a period of ten or even more years. In other words, at least 90% of businesses are getting their web sites for 1% or less of their turnover and 10% or less than their price for one physical shop lease. Certainly, there are domain names sold for over USD 100 000 and even rare cases of sales for over USD 1 000 000, but they represent less than 1% of all domain names (SHONTELL, 2012). In addition, it is possible to buy the entire online retail business with all its assets – principal web site, subsidiary web sites, the domain with the domain name, rights to web site design covered by copyright and the software required to maintain and to update the whole web site set, while the domain name is typically the top concern of the buyer and has the biggest influence on the amount of the total price (Gilbert, 2013). Thus, unless a business is bound and determined to do e-business, then its e-platform, which is open to the entire universe, should be relatively easily obtainable and significantly cheaper and entailing less effort than a small shop on the corner.

Strangely enough, Prof. Mazák added, in point 40 of his opinion, probably to support his above mentioned and rejected opinion, that the e-business by distributors is not a problem for a manufacturer, because the manufacturer can contractually arrange with distributors about their e-platforms, monitor them and enforce the compliance, and so counteract free-riding and ensure that the manufacturer's distribution network operates in a balanced and equitable manner. The flaw in such an argument is due to the number of distributors and outlets, i.e. 23 000 outlets is an impressive amount. Despite the well advanced IS/IT, it seems virtually impossible to monitor thousands and thousands of web sites continuously for their compliance and to monitor all other web sites so that they do not illegally infiltrate into the selective distribution network. In addition, even if such monitoring would generate information about infringement, the enforcement would be difficult due to the problem with the evidence as well as with the foundation on a mere disputable alleged violation of a contract clause and the enforcement in general.

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Interestingly, in point 54. Prof. Mazák correctly observed that "*It is conceivable that there may be circumstances where the sale of certain goods via the internet may undermine inter alia the image and thus the quality of those goods thereby justifying a general and absolute ban on internet sales.*" However, he immediately continued reincorporating his previous problematic opinion from point 40, i.e. he stated:„*However, given that a manufacturer can, in my view, impose appropriate, reasonable and nondiscriminatory conditions concerning sales via the internet and thereby protect the image of its product, a general and absolute ban on internet sales imposed by a manufacturer on a distributor is, in my view, proportionate only in very exceptional circumstances*." Since Prof. Mazák again repeated this very sentence in point 61, there is not the smallest doubt that he is intimately and almost irrevocably convinced that a manufacturer can easily, through contracts with distributors, ensure the quality of goods and services marketed via the Internet. It would be extremely interesting to learn from him how this should be done.

3.2 Statements and arguments about IS/IT advanced in the Judgment of the Court of Justice (Third Chamber) given on 13th October 2011 in *C-439/09 Pierre Fabre*

The judgment in *C-439/09 Pierre Fabre* was given by the Third Chamber of the Court, presided by K.Lenaerts. The judge rapporteur was E.Juhász and one of the involved judges was as well D.Šváby, originally a Slovak civil and family law judge. Thus, the most involved judge in the proceedings and preparation of the judgment in *C-439/09 Pierre Fabre* was E.Juhász, who has a strong government and diplomatic background, including a Commercial Counselor position. With a touch of exaggeration, it can be suggested that *C-439/09 Pierre Fabre* is an outcome of Slovak-Hungarian judicial and diplomatic perception regarding competition and IS/IT and, as was shown above regarding the Advocate General, and as it will be shown below regarding the court, especially the judge rapporteur, the superior mastery of competition law aspects was not matched by their mastery of IS/IT.

The judgment in *C-439/09 Pierre Fabre* is significantly sententious and the explanation is rather brief and without arguments developed in their entirety, as was done in the opinion by Prof. Mazák. The CJ EU agreed with the European Commission by stating that the clause *de facto* excluding online sales considerably reduced the authorized distributor's ability to sell to customers in their allocated territories of activity, i.e. restricting the competition (Themelis, 2012). Further, since the conclusions of both, opinion and judgment, are similar, if not identical, and since no arguments from the opinion are rejected by the judgment and no arguments are added by the judgment, it is plausible to conclude the CJ EU embraces and endorses the above critically discussed arguments presented by Prof. Mazák in the opinion. Thus, the judgment added only one more element to the opinion with a high significance for IS/IT and included it in the point 46, according to which " *The aim of maintaining a prestigious image is not a legitimate aim for restricting competition and cannot therefore justify a finding that a contractual clause pursuing such an aim does not fall within Article 101(1) TFEU."* and thus the will of the manufacturer of, e.g. luxury items, to avoid their online trafficking is not a legitimate aim excusing the restricting impact on the competition. From a strictly legal point of view, this strong statement of the CJ EU cannot be rejected *per se*. However, when the economic and intellectual property aspects are added, it seems at least understandable that owners of well known trademarks do not want to see their genuine goods and services being mixed on obscure Internet web sites with free-riding and counterfeited products or to see various pretenders and cybersquatters trying to parasite on their hardly built *renomé.* It is obvious that the exclusion of products from online sales reduces the abusive options of many parasites. Similarly, it is obvious that the anonymity inherently linked to the Internet causes any enforcement of the intellectual property rights to become extremely challenging. Finally, it is obvious that prohibiting certain clauses from contractual arrangements reduces the contractual freedom of parties.

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In this context there needs to be underlined point 44 of the judgment confirming a truly firm and concise attitude of the Court, according to which:" *The court, in the light of the freedoms of movement, has not accepted arguments relating to the need to provide individual advice to the customer and to ensure his protection against the incorrect use of products, in the context of nonprescription medicines and contact lenses, to justify a ban on internet sales (see, to that effect, Deutscher Apothekerverband, paragraphs 106, 107 and 112, and Case C-108/09 Ker-Optika [2010] ECR I-0000, paragraph 76*)." Well, one more time, the CJ EU shows that the top priority is the *"undistorted competition"* on the internal market, and the integration in general, and that this cannot be changed by concerns regarding consumer welfare, contractual freedom or IS/IT operation.

3.3 Aftermath of *C-439/09 Pierre Fabre* with its impact on IS/IT

The growing importance of e-business, especially e-commerce via Internet domains which carry domain names referring to the particular business and/or products, highlights how vertical competition law and its enforcement are important building blocks of competition law policies on both sides of the Atlantic. However, there are noticeable differences in the manner in which restrictions of online sales are assessed. In the USA there prevails a rather liberal approach towards distribution restraints and this is in contrast with the stricter EU approach, which is caused by the mandates of the single internal market (Accardo, 2013). The fact that EU rules require more significant compliance efforts for vertical agreements than the USA rules may generate some agitation and complaints, but still it is understandable and acceptable, provided it is done properly. However, going in the IS/IT e-business *par excellence* sphere in an ill-informed and ill-considered manner is deplorable. Hence the policies and communications issued by the European Commission and the precedential decisions entered by the CJ EU regarding restrictions on vertical contractual freedom with respect to e-business must reflect a superior knowledge and appreciation of how the vertical business through Internet domains is done in the EU in the second decade of the 21st century.

The *C-439/09 Pierre Fabre* is positively referred to by the CJ EU and thus can be perceived, at least with respect to certain of its aspects, as a precedent. In judgement *C-1/12 Ordem dos Técnicos Oficiais de Contas* it is done in point 70, according to which." *Although it is for the referring court to examine whether the contested regulation has had or is likely to have harmful effects on competition in the internal market, it is for the Court to provide it, for this purpose, with the points of interpretation of European Union law which enable it to reach a decision (see, to that effect, Case C-439/09 Pierre Fabre Dermo-Cosmétique [2011] ECR I-0000, paragraph 42*)." In *opinion C-226/11 Expedia* delivered by the Advocate Generale, J.Kokkot, there is found the *C-439/09 Pierre Fabre* referred to in point 41 and point 49 as a footnote and deals with the issue of appreciating the general economic and legal context of a particular agreement and of proof of the capacity of an agreement to restrain competition. As well, *C-439/09 Pierre Fabre* is referred to in both opinion and judgment, in *C-32/11 Allianz*. Although the post-judicial evolution confirms that *C-439/09 Pierre Fabre* is a good precedential case, it does not bring more light in the rather confused ideas, opinions and even statements about IS/IT presented in *C-439/09 Pierre Fabre.*

The *C-439/09 Pierre Fabre* became a subject of important academic and professional discussions and its analysis was several times presented from various angles in the academic press. It prompted as well practitioners´ concerns that following *C-439/09 Pierre Fabre*, manufacturers of luxury brands might face difficulties in protecting the image of their goods and services commercialized through selective distribution systems and especially to run into difficulties regarding the control of their distribution via the Internet (Svetlicinii, 2011). The CJ EU seems to become more strict than in *C-59/08 Copad* and *T-88/92 LeClerc* and the aura of luxury linked to the quality of product seems to lose its recognition and protection by the CJ EU. Such a move deserves a serious and well-argued explanation, which, so far, has not been fully provided.

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Even more importantly, *C-439/09 Pierre Fabre* and its aftermath discussions contributed to the official recognition of the Internet´s ubiquitous status for commercial purposes by the EU (Themelis, 2012). In the light of the arguments presented by the CJ EU in *C-439/09 Pierre Fabre*, its approach and perception of IS/IT and its determination to stick with the same competition rules and apply them in the same manner to the tangible as well as intangible, it is clear that a more modern and IS/IT aware outlook is maintained by the second organ of the EU integration tandem, the European Commission. Namely, COM/2010/0245 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Region, A Digital Agenda for Europe, was prepared and as a part of the Europe 2020 Initiative should help to reboot Europe's economy and help EU Citizens and businesses to get the most out of IS/IT. Along with the other six initiatives under the Europe 2020 Initiative, it should assist with the smart sustainable and inclusive growth. The Commission Communication COM (2011) 942, A coherent framework for building trust in Digital Single Market for E-Commerce and Online Services (2012) follows this line.

Hence, the CJ EU with its emphatic ruling that any restriction in using the Internet is prohibited, and its conviction that the Internet cannot develop to anything more than a complementary distribution mode which is inherently linked to the physical marketplace, does not respect the market evolution in the 21st century (Themelis, 2013). The European Commission is more open-minded and attempts to go ahead with the Europe 2020 Initiative, but it still is balancing between the old approach firmly maintained by the CJ EU and the new approach recognizing that the Internet is an autonomous commercial space to which the traditional competition rules must be applied flexibly.

The first hypothesis, that statements and arguments in *C-439/09 Pierre Fabre* about IS/IT in the opinion and judgment contradict each other and can hardly be reconciled with each other and do not reflect the current role and function of IS/IT, especially of domain names, was confirmed by a number of logical arguments and current publicly available economic data. The second hypothesis, that the EU and EU law are both undergoing an evolutionary, if not revolutionary, change in their perception and attitude towards the Internet was confirmed based on the review of the agitated aftermath of *C-439/09 Pierre Fabre* and the issuance of the Commission Communication COM (2011) 942. It is obvious that the EU is at a crossroads, and if it really wants to become more competitive and meet the objectives of Europe 2020 Initiative, then both the European Commission and the CJ EU (!!!) will have to perfectly understand the Internet and its functions, especially the e-business potential and the critical role of domain names for e-commerce. This honest and deep understanding is definitely more important than the mere issuance of new legislations or proclamations worshiping IS/IT.

4 Conclusion

The EU and European integration have been significantly supported and developed by the synchronized co-operation of the European Commission and the CJ EU. They have shaped European policies as well as EU law. In the post-Lisbon EU, their coordinated efforts with respect to the single internal market and the protection of competition and their inclination to consistency runs contrary to several aspects of modern IS/IT. The *C-439/09 Pierre Fabre* is a perfect demonstration that the application of the "old" competition rules, developed without consideration of e-business, should be applied with extreme caution, if at all, to vertical and intra-brand e-business conduct. It appears that commercialization has changed dramatically between 1951 and 2014, far more than the CJ EU is willing to admit. There is no need for a revolution, but there is a clear need for enhancing awareness and evolving, and apparently the Commission is better at it than the CJ EU, or at least some senior members of the CJ EU.

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The *C-439/09 Pierre Fabre* shows a rather problematic understanding and perception of IS/IT and of the importance of domain names for business by both the European Commission and the CJ EU. The determination to rigidly apply the same rules to regular ordinary business and e-business is not sustainable and is not in compliance with the Europe 2020 Initiative. The European Commission seems to understand the newly emerged needs, although the inclination to balance between the old and new approach is still noticeable. Regarding the CJ EU, the situation appears more challenging and the many times extremely praiseworthy and terrific consistency appears to be rigid and contra-productive with respect to IS/IT and denying the market evolution. If nothing else, arguments and opinions advanced in *C-439/09 Pierre Fabre* were very good for the EU before the turn of the millennium, but in the second decade of the 21st century they must undergo an update. The Europe 2020 Initiative, and its seven flagship instruments, is a wonderful opportunity to cross the Rubicon, leave behind the old-fashioned ideas about IS/IT included in *C-439/09 Pierre Fabre* and definitely strip this outdated thinking from its dangerous potential of being the bad genie locked up in the bottle and ready to jump out.

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