MacGREGOR PELIKÁNOVÁ, Radka. The unbearable lightness of imposing e-commerce in a vertical agreement setting. *Antitrust – Revue of Competition Law*, 2015, 3, 68-76. ISSN 1804-1183.

The unbearable lightness of imposing e-commerce in a vertical agreement setting

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Four years ago, the Court of Justice gave a judgment with a critical impact on the vertical agreement setting in the EU. Namely, the Court of Justice with the C-439/09 Pierre Fabre crossed the Rubicon and presented its rather radical perception that a clause requiring sales in a physical space results in a ban on the use of the Internet for sales and amounts to a restriction by object pursuant to Art. 101(1) TFEU. Alea iacta sunt – the die is cast, no more contractual restrictions on e-commerce in selective distribution system! Interestingly, in similar EU arenas, such as franchise, holding or single economic entity, no small sign of such a trend is to be found. Even more interestingly, the USA approach to e-commerce restraining distribution clauses is liberal. Undoubtedly, C-439/09 Pierre Fabre is a strategic conceptual decision and it is legitimate to analyze its underlying philosophy in the light of the EU top priorities and to determine whether C-439/09 Pierre Fabre goes with or against Europe 2020.

Abstract

The year 2010 is often presented as a turning point in the post-Lisbon European integration era. The deepest point of the economic and financial crisis was overcome and Barroso´s Commission, with the endorsement of the Court of Justice of the EU ("CJ EU"), demonstrated a strong determination to learn from the crisis and to take measures to make the EU stronger and more competitive on the global stage. The hallmark of this trend, which continues even today, is the very concrete and pragmatic Com(2010)2020 final Communication from the Commission Europe 2020 - A strategy for smart, sustainable and inclusive growth from 3rd March, 2010 ("Europe 2020"). One year later, the CJ EU gave a very clear judgment in case *C-439/09 Pierre Fabre Dermo Cosmétique SAS v. Président de la concurrence ("C-439/09 Pierre Fabre")*. Both, Europe 2020 and *C-439/09 Pierre Fabre* are well recognized, valid and reconfirmed and they focus on the single market, modern information systems and information technologies ("IS/IT") and their interaction. However are they compatible? Does *C-439/09 Pierre Fabre* manifestly support and strongly reinforce the 3 priorities, the 5 targets and the 7 flagship initiatives of Europe 2020? Is the pro-integration tandem, the Commission and the CJ EU on the same page regarding the employment of IS/IT with respect to the single market? Are similar vertical settings, such as franchise or single economic entity or holdings, treated similarly? Surprisingly, answers to these questions are more negative than positive and indicate a misunderstanding and/or the issue of the tail wagging the dog. Perhaps the CJ EU went, with good intentions, too fast too far, without realizing that any ultimatum made by the public power about intangible and constantly evolving IS/IT represents a risk, a potential for irrelevancy and a reduction of competitiveness and innovativeness. The interaction of IS/IT and of the internal market is a very fine and fragile mechanism and it is worthy to deeply think twice before moving to a tempting measure entailing compulsory resolutions regarding a certain field. After all, in the cradle of the IS/IT, Internet and e-commerce, i.e. in the USA, a

more liberal approach is embraced and USA competition law is definitely not so strict regarding restricting distribution clauses, both offline and online, as the EU competition law. Has not the EU´s will, as presented by the approach of the CJ EU, to use competition law to support the single internal market led to a misunderstanding of e-commerce and ultimately against growth and competition?

Introduction

The concept of *economic integration* has been a hallmark element of post-war economic thinking over trade and international economic relations.[1] Its impact along with the dominance of technocratic over political institutions was significant for the first decades of European integration.[2] The post-war transfer of competition law from the USA to Europe led to an European acceptance of bureaucratic interventions into the market to promote social welfare,[3] along with integration objectives. To some extent, this trend continues today, when European integration is centered around the internal market with its four famous freedoms. The current setting is primarily determined by the post-Lisbon 2012/C 326/01 Treaty on the European Union ("TEU")[4] and Treaty on the functioning of the European Union ("TFEU"). Pursuant to TEU and TFEU, the EU has the exclusive conferred competence regarding the establishing of the competition rules needed for the functioning of the internal market [5] and has the shared conferred competence in re to the area of the internal market in general.[6] The European Commission, particularly the department Directorate-General for Competition of the European Commission ("DG EC"), is the supranational competition authority.[7] For enforcing competition regulations, the DG EC closely works together with national competition authorities ("NCAs").[8] The NCAs plus national courts must apply, in addition to national competition laws, also EU competition law when faced with a trade situation between EU member states.[9] Due to the doctrines of supremacy plus the direct effect of EU law and express provisions,[10] the EU competition law has the final say. [11]

[1] MACHLUP, Fritz. *A History of Thought on Economic Integration*. London, UK : Macmillan Press, 1977, 323 p. ISBN 0333213440

[2] MacGREGOR PELIKÁNOVÁ, Radka. *Selected current aspects and issues of European integration*. Ostrava, CZ : Key Publishing, 2014, 186 p. ISBN 978-80-7418-226-6.

[3] FREYER, Tony A. *Antitrust and Global Capitalism, 1930-2004*. Cambridge, UK : Cambridge University Press, 2006, 437 p. ISBN 13-978-0-521-81788-2, p. 245.

[4] Art. 3 TEU.

[5] MacGREGOR PELIKÁNOVÁ, Radka. Divergence of antitrust enforcements – where, and where not, to collude. *Antitrust – Revue of Competition Law*, 2014, 2, i-viii. ISSN 1804-1183.

[6] Art. 3 and 4 TFEU.

[7] MacGREGOR PELIKÁNOVÁ, Radka. Divergence of antitrust enforcements – where, and where not, to collude. *Antitrust – Revue of Competition Law*, 2014, 2, i-viii. ISSN 1804-1183.

[8] MacGREGOR PELIKÁNOVÁ, Radka. *Selected current aspects and issues of European integration*. Ostrava, CZ : Key Publishing, 2014, 186 p. ISBN 978-80-7418-226-6.

[9] Regulation 1/2003 - Article 3 *1. Where the competition authorities of the Member States or national courts apply national competition law to agreements, decisions by associations of undertakings or concerted practices within the meaning of Article 81(1) of the Treaty which may affect trade …..*

[10] Regulation 1/2003 - Article 3 *2. The application of national competition law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States but which do not restrict competition within the meaning of ….*

[11] MacGREGOR PELIKÁNOVÁ, Radka. Divergence of antitrust enforcements – where, and where not, to collude. *Antitrust – Revue of Competition Law*, 2014, 2, i-viii. ISSN 1804-1183.

The modern EU competition law is considered to be a unique law, which is enforced in a special context, namely it is a support mechanism for market integration. At the same time, it is still a competition law and thus it is a law which was desired neither by lawyers nor economists, but by politicians and scholars,[12] and, considering the proactive and consistent approach of the CJ EU, judges as well.[13] As a matter of fact, the pro-integration tandem, the Commission and CJ EU,[14] has played a central role for the interpretation, applications and even the shaping of competition law.[15]

The EU in general, and the DG EC in particular, seems to focus much more on cartels than on monopoly cases. Every year, it deals with 4 to 7 cartel cases and the judicial confirmation of imposed fines reaches at least 70%.[16] There is some criticism targeting the administrative procedure conducted by the very powerful DG EC and ending with the issuance of the cartel fine smoothly approved by the "sister" EU organ, the CJ EU, and suggesting that procedural safeguards are not sufficient.[17] However, the general impression of an active DG EC, endorsed by the CJ EU, valiantly battling in the name of the EU, EU law, EU market and EU subjects against cartels and scaring them seemed beyond any doubt[18] until the emergence of the Europe 2020 and *C-439/09 Pierre Fabre.* The economic and financial crisis ended perhaps in 2010, but with it ended the sunny era of the partnership between the top EU state integration tandem, France and Germany[19] and maybe of the partnership between the top EU institutional integration tandem, the Commission and the CJ EU. It appears that the tense reactions after the crisis and the related drive to make a stronger EU led the Commission with the endorsement of the Parliament and Council on one side and CJ EU on another side to different conclusions about the use of IS/IT, especially the Internet, by competitors in the internal market. To understand this complex and rather surprising suggestion linked to the case study of *C-439/09 Pierre Fabre*, it is necessary to correctly perceive the use of IS/IT and the Internet by competitors on the internal market and the electronic business ("e-business") as such (1.), the Commission´s perception, endorsed by Parliament and Council, towards the "splendor" of the e-business on the internal market (2.), the CJ EU's determination to avoid e-commerce restrictions within vertical distribution as stated in *C-439/09 Pierre Fabre*, and confirmed in following cases, and

[12] DABBAH, Maher M. *The Internationalisation of Antitrust Policy*. Cambridge, UK : Cambridge University Press, 2003, 322 p. ISBN 978-0-521-82079-0, p. 86-89.
[13] MacGREGOR PELIKÁNOVÁ, Radka. *Selected current aspects and issues of European integration*. Ostrava, CZ : Key Publishing, 2014, 186 p. ISBN 978-80-7418-226-6.
[14] BURLEY, Anne-Marie, MATTLI, Walter. Europe Before the Court: A Political Theory of Legal Integration. *International Organization*, 1993, 47(1): 41-76. ISSN 0020-8183.
[15] DABBAH, Maher M. *The Internationalisation of Antitrust Policy*. Cambridge, UK : Cambridge University Press, 2003, 322 p. ISBN 978-0-521-82079-0, p. 91.
[16] Europan Commission. *Cartel Statistics*, 2013. Availalbe at http://ec.europa.eu/competition/cartels/statistics/statistics.pdf
[17] MacGREGOR, Anne, GECIC, Bogdan. Due Process in EU Competition Cases Following the Introduction of the New Best Practices Guidelines on Antitrust Proceedings. *Journal of European Competion Law and Practice*, 2012, 3(5): 425-438. Online *ISSN* 2041-7772 - Print *ISSN* 2041-7764.
[18] MacGREGOR PELIKÁNOVÁ, Radka. Divergence of antitrust enforcements – where, and where not, to collude. *Antitrust – Revue of Competition Law*, 2014, 2, i-viii. ISSN 1804-1183.
[19] MacGREGOR, Robert. Euro Crisis from German and French Perspectives. *ACC Liberec, Issue B Science of Economics*, 2013, XIXB (2), pp. 53-63. ISSN 1803-9782.

thus fight against the "misery" of e-commerce (3.), and the case law and academic views regarding similar restrictions in similar settings – "lost illusions"? (4.) Or should not we move from parables based on masterworks by Honoré de Balzac, *Illusions perdues* and *Splendeurs et misères des courtisanes*, to these based on first European novel by Miguel de Cervantes, *El Ingenioso Hidalgo Don Quixote De la Mancha*?

1. The use of IS/IT and the Internet and the signficance of e-business for the the operation on the internal market

Our post-modern society is marked by an intensification and extension of the use of IS/IT in almost all fields, leading to a general virtualization as well as by a vigorous global competition.[20] A successful and sustainable enterprise in the EU, especially if it is a small and medium-sized enterprise ("SME"), needs to reflect these hallmarks and embrace appropriate new business methods, practices and forms[21] in order to be more effective and efficient than its rivals[22] without hurting consumers and the entire society.[23] The role of the EU and EU member states is to understand this challenge, balance involved priorities and provide a framework encouraging the optimal employment of IS/IT by competitors on the internal market.

An indispensable start of the analysis about the use of the Internet by competitors on the internal market is to recapitulate the meaning and functions of IS/IT. The IS is a system consisting of tangible as well as intangible elements which process information. Thus, it is typically an intra-connected information network of people and their e-devices. IT is the application of the IS, typically the employment of e-devices to store, retrieve, transmit and process data. Hence, IS/IT is about e-networking and the current best known global e-communication network connecting e-devices and e-subnetworks around the world, while using the same communication protocols, is the Internet. 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. Thus, a domain is an e-platform for a set of related web pages called a Website and all publically accessible Websites constitute the World Wide Web ("www").[24]

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[20] MacGREGOR PELIKÁNOVÁ, Radka. Internet My Dearest, What Type of European Integration Is The Clearest? *Acta Universitatis Agriculturae et Silviculturae Mendelianae Brunensis*, 2013, LXI(7):2475-2481. ISSN 1211-8516. Permanently available at http://dx.doi.org/10.11118/actaun201361072475

[21] ŠIMBEROVÁ, Iveta. Company strategic marketing management – synergic approach and value creating. *Acta Universitatis Agriculturae et Silviculturae Mendelianae Brunensis*, 2010, LVIII(6): 543–552. ISSN 1211-8516. Available at http://www.mendelu.cz/dok_server/slozka.pl?id=45392;download=72034

[22] SYCHROVÁ, Lucie. Measuring the effectiveness of marketing activities use in relation to company size. *Acta Universitatis Agriculturae et Silviculturae Mendelianae Brunensis*, 2013, LXI(2):493-500. ISSN 1211-8516. Available at http://acta.mendelu.cz/61/2/0493/

[23] MacGREGOR PELIKÁNOVÁ, Radka. Divergence of antitrust enforcements – where, and where not, to collude. *Antitrust – Revue of Competition Law*, 2014, 2, i-viii. ISSN 1804-1183.

[24] MacGREGOR PELIKÁNOVÁ, Radka. Potential Impact of the Famous Pierre Fabre Case on e-Business in the EU – The European Secret message about the significance of Domain names In: TULEJA, Pavel, and others (Eds.). *Conference Proceedings XII. International Scientific Conference Economic Policy in European Union Member Countries*, Ostravice, CZ, 16th-18th September, 2014, p. 594-605 of 1093. ISBN 978-80-7510-045-0.

Around the turn of the millennium, Bill Gates suggested that the Internet would help achieve *friction free capitalism* by putting buyer and seller in direct contact and generally provide more information.[25] Well, we do not seem to be completely there, nevertheless the employment of IS/IT, especially the use of the Internet, by businesses for their business activities is labeled e-business and is absolutely critical for the business conduct in the 2nd decade of the 21st century. In a larger sense, e-business means doing with the assistance of telecommunications and telecommunication-based or other electronic tools electronically,[26] i.e. while applying IS/IT. In a narrow sense, e-business means doing business, externally as well as internally, with help of the Internet. The principal goals of e-business are profits, reduction of expenses, acquisition of new clients, enhancement of the loyalty of customers, offers of new goods and services and the development of distribution channels.[27] Based on the extent, advancement and maturity, several sub-types of e-business can be distinguished: presentation of basic information about the business via the Internet (i), presentation of information about the business and communication with customers via the Internet (ii), presentation of information about the business, communication with customers and their ordering via the Internet (iii) and the entire integration and connection into a virtual business network (iv). These sub-types translate into a plain Website (i), the e-commerce (ii), the integrated e-commerce (iii) and the integrated e-business (iv). Thus, e-commerce is one rather fundamental phase or level of e-business, which entails e-sales. It involves an exchange of data related to ordering, selling and generally completing business transactions increasingly important to conducting business.[28] The volume of business transactions via the Internet has rapidly increased while the value of goods, services, and information exchanged through the Internet appears to be annually doubling or even tripling.[29] Like previous retail innovations, e-commerce leads to a rebalancing of powers in the market, in particular in the supply chain.[30]

Modern European integration is inherently linked to the concept of the internal market, the global competitiveness and sustainable growth. The Commission and the CJ EU are vigorously supporting instruments promoting the single internal market and appropriate competition in it and fighting against instruments hurting and hampering the internal market and unduly restraining competition in it.[31] Healthy competition should

[25] ACCARDO, Gabriele. Vertical Antitrust Enforcement: Transatlantic Perspectives on Restrictions of Online Distribution under EU and US Competition Laws. *European Competition Journal*, 2013, 9(2): 225-340. ISSN 1744-1056.

[26] CLARKE, Roger. *Seeking Success in E-Business.* Boston, MA : Kluwer Academic, 2003. ISBN 1-4020-7450.

[27] BÍLKOVÁ, Renáta, DVOŘÁK, Jiří. Possibilities in advancement of e-shop. *In Scienitific papers of the University of Pardubice. Series D, Faculty of Economics and Administration*, 2012, 25(3): 30-41. ISSN 1211-555X.

[28] MacGREGOR PELIKÁNOVÁ, Radka. The (in)significance of domain names for e-commerce. *ACC Liberec, Issue B Science of Economics*, 2013, XIXB (2): 40-52. ISSN 1803-9782.

[29] TIŠLEROVÁ, Kamila. What are advantages of internet shopping as perceived by customers? *ACC Journal – Issue B*, 2012, vol. 18, Iss. 2, pp. 188-195. ISSN 1803-9782.

[30] ACCARDO, Gabriele. Vertical Antitrust Enforcement: Transatlantic Perspectives on Restrictions of Online Distribution under EU and US Competition Laws. *European Competition Journal*, 2013, 9(2): 225-340. ISSN 1744-1056.

[31] MacGREGOR PELIKÁNOVÁ, Radka. Potential Impact of the Famous Pierre Fabre Case on e-Business in the EU – The European Secret message about the significance of Domain names In: TULEJA, Pavel, and others (Eds.). *Conference Proceedings XII. International Scientific Conference*

encourage business to offer consumers goods and services on the best terms, to be more effective and efficient, to engage in research and development ("R&D"), to reduce prices and increase quality, in short, to be better, more globally competitive and have sustainable growth. The protection of the internal market should contribute to R&D, sustainable growth and global strengthening of the EU, and vice versa. The EU competition policy, reflected by Art. 101 and Art. 102 of the TFEU, by the Council Regulation (EC) No 1/2003 on the implementation of the rules on competition („Regulation on the implementation of antitrust rules") and the Commission Regulation (EU) No 330/2010 of 20 April 2010 providing a block exemption from the application of Art, 101(1) TFEU to vertical agreements ("Regulation on a block exemption for vertical agreements"), is inseparably linked to policies for R&D and to the general strategy for sustainable growth, as stated by Europe 2020. As a matter of fact, the EC/EU legislative evolution from the "pro-franchising agreement" Regulation 4087/88 over the old "vertical exemption" Regulation 2790/1999 to the new Regulation on a block exemption for vertical agreements 330/2010, is an odyssey about welcoming the modern IS/IT, including the Internet, in the vertical agreement setting.

In the last five years, a large majority of EU decision-makers and representatives as well as European businesses have become fully aware about the critical importance of the employment of the Internet for the dealing on the internal market. 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 Website, 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.[32] Barosso´s Commission kept this in mind when it prepared the strategy for the EU after the deepest point of the crisis and the spirit and even wording of Europe 2020 makes this clear beyond any reasonable doubts. As a matter of fact, Barroso´s Commission and Juncker´s Commission have been very consistent in this respect and they were endorsed both by the Council of EU andas the European Parliament and thus ideas from Europe 2020 are incorporated virtually in all EU documents and policy in the last six years.

2. The Commission´s perception endorsed by the Parliament and Council – the "splendor" of e-business on the internal market

The EU is aware about the importance of IS/IT, the Internet and e-business for a sustainable development and a stronger integration and makes it clear that the e-format is vital for the 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 EU has a robust strategy about it, Europe 2020, as well as a myriad of other instruments and measures, such as 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

Economic Policy in European Union Member Countries, Ostravice, CZ, 16th-18th September, 2014, p. 594-605 of 1093. ISBN 978-80-7510-045-0.

[32] GILBERT, Cassandra, LAWSON, Sarah. Selling an online detail business. *Corporate Rescue and Insolvency*, 2013, V(6): 191-192. ISSN 1756-2465.

("Directive on e-commerce").[33] At the same time, there is no conclusive evidence that the EU legislative triangle, especially the Commission, recognizes the naivety of the idea that e-commerce is a mere additional marketing channel, no different than telephone or mail.[34]

On 3rd March, 2010, was issued a very concrete and pragmatic document containing 34 pages and providing clear messages and guidelines - Europe 2020. It as a strategy for the EU emerging out of the crisis and facing transformations in order to reach a smart (i), sustainable (ii) and inclusive growth (iii). Europe 2020 sets these three priorities and, based on them, defines five targets where the EU wants to be in 2020 – 75% productive age population employed, 3% of EU´GDP invested in R&D, 20/20/20 climate energy targets, at least 40% of youth in college and 20 million less people at risk of poverty. The 3 priorities represented by 4 targets are carried by 7 flagship initiatives including Innovation Union, a Digital Agenda for Europe and an Industrial policy for the globalization era to improve the business environment, especially for SMEs.

On 8th June, 2010, i.e. three months after Europe 2020, was issued the Directive on e-commerce. Hence the Directive on e-commerce is one of the very first outcomes of the EU secondary law developing and implementing 3-5-7 of Europe 2020 with a direct reference to the internal market and e-commerce. The brains and force behind the Directive on e-commerce was the Commission and it appears that the Parliament and Council did not have any significant issues to follow the lead. It is absolutely critical to keep in mind the very wording of Art. 1 of the Directive on e-commerce which states "*This Directive seeks to contribute to the proper functioning of the internal market by ensuring the free movement of information society services between the Member States".* Pursuant to Art. 2 of the Directive on e-commerce the *information society services* are services within the meaning of Art.1(2) of Directive 98/34/EC as amended by Directive 98/48/EC, i.e. "*any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services*." The Directive on e-commerce demands that providing of information society services is done in compliance with law, without the need of prior authorization and in a non-anonymous manner. The entire Section 2 of the Directive on e-commerce deals with commercial communication and underlines the duty to clearly label commercial communications and promotional offers as such, and to have an opt-out system for recipients regarding unsolicited commercial communications. However, the Directive on e-commerce does not only count on e-presentation, it expects as well e-contracting, i.e. the possibility to conclude contracts by electronic means.

The Europe 2020 trend launched by Barroso´s Commission in 2010 continues even now in the era of Juncker´s Commission, the single digital market is one of the main objectives advanced, and especially three Commissioners are in charge in this respect –

[33] MacGREGOR PELIKÁNOVÁ, Radka. Potential Impact of the Famous Pierre Fabre Case on e-Business in the EU – The European Secret message about the significance of Domain names In: TULEJA, Pavel, and others (Eds.). *Conference Proceedings XII. International Scientific Conference Economic Policy in European Union Member Countries*, Ostravice, CZ, 16th-18th September, 2014, p. 594-605 of 1093. ISBN 978-80-7510-045-0.

[34] ACCARDO, Gabriele. Vertical Antitrust Enforcement: Transatlantic Perspectives on Restrictions of Online Distribution under EU and US Competition Laws. *European Competition Journal*, 2013, 9(2): 225-340. ISSN 1744-1056.

the Commissioner for digital economy and society, the Commissioner for consumer protection and the Commissioner for competition.[35] Just a few months ago, on 6th May, 2015, Juncker´s Commission issued a new strong contribution to the development and implementation of the Europe 2020, namely its´ 2nd priority – a connected digital market. It is the COM(2015) 192 Communication from the Commission to the European Parliamant, the Council, the European Economic and Social Committee and the Committee of the Regions – A Digital Single Market Strategy for Europe ("Communication on Digital Single Market Strategy"). Accordingly, "*The global economy is rapidly becoming digital. Information and Communications Technology (ICT) is no longer a specific sector but the foundation of all modern innovative economic systems… The Digital Single Market Strategy will be built on three pillars: Better access for consumers and businesses to online goods and services across Europe, Creating the right conditions for digital networks and services to flourish and Maximising the growth potential of our European Digital Economy*." The Communication on Digital Single Market Strategy provides a matching trio set of actions to be discussed on a multi-stakeholder level and implemented in 2015 and 2016, such as legislative proposals for simple and effective cross-border contract rules for consumers and businesses or competition sector inquiries into e-commerce, relating to the online trade of goods and the online provision of services or comprehensive analysis of the role of platforms in the market including illegal content on the Internet. The Eurostat statistical book from 2015 expressly states that „*Among the EU policy insturments, the flagship initiative „Innovation Union" is the most prominent …. has increased political focus on the digial economy while also strengthening the use of internet, development of e-commerce, availability of e-government services and accessibility of basic broadband internet connections in most of Europe.*[36] Well, despite the slight over-playing of e-commerce and under-playing of other sub-types of e-business, the Commission seems to be „right on track" and its eagerness to develop a true dialogue, to listen-observe-understand and accordingly make commonly welcome measures towards satisfying all three Europe 2020 priorities should be applauded. However, it takes two to dance the tango and true applause should be given only if bothmembers of the tandem dance well…. and here the trouble starts….

3. The CJ EU determination to avoid e-commerce restrictions within vertical distribution as stated in *C-439/09 Pierre Fabre* – the "misery" of the e-commerce on the internal market

Cartels are omnipresent, destructive, only seldom legitimated and barely detectable. They increase prices by 15-25%, drive away competitors, reduce the number of jobs, true competitiveness, the national GDP and the income in the state budget.[37] Cartels are clearly bad for the internal market and European integration in general. The EU law provides a robust legal framework to fight against it and the Commission and the CJ EU do not hesitate to interpret it and apply it. Certainly, horizontal cartel agreements are more destructive and dangerous for competition, but even vertical cartel agreements

[35] MUSIL, Aleš. ICT, Telecommunicaitons, Internet and competition law. *Antitrust – Revue of Competition Law*, 2015, 2, 53-55. ISSN 1804-1183.

[36] EUROSTAT Statistical books. *Smarter, greener, more inclusive? Indicators to support the Europe 2020 strategy*. 2015 edition, Luxembourg : Publication Office of the European Union, 2015, 195 p. ISBN 978-92-79-40079-7, p. 77.

[37] MacGREGOR PELIKÁNOVÁ, Radka. Divergence of antitrust enforcements – where, and where not, to collude. *Antitrust – Revue of Competition Law*, 2014, 2, i-viii. ISSN 1804-1183.

represent a threat. Thus selective distribution systems and their operation as contractually set are definitely a target of close scrutiny based on the Art. 101 TFEU and related secondary EU law, such as Regulation on the implementation of antitrust rules and Regulation on a block exemption for vertical agreements. At the very center of such a scrutiny is often the so called *object box*, i.e. the orthodox approach and/or analytical approach assessing whether the vertical agreement has for an object the restriction of competition or not.[38] How pernicious are contractual clauses within selective distribution systems which restrict e-commerce and amount to the prohibition of online sales? If they are particularly pernicious, they are within the bad object box[39] and thus should be considered similar to *per se* offences of section 1 of the Sherman Act and thus definitely evil and irrevocably illegal!

The Regulation on the implementation of antitrust rules generalize individual exemptions for agreements caught by Art. 101(1) TFEU which satisfy the conditions of individual exemptions pursuant to Art. 101(3) TFEU, i.e. "*agreements which contributes to improving the production or distribution ... while allowing consumers a fair share of the resulting benefit*....". Thus such agreements are saved automatically by Art. 101(3) TFEU and no prior decision to that effect is required. Regulation on a block exemption for vertical agreements excludes from the prohibiting coverage of Art. 101(1) TFEU vertical agreements not covering 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.[40]

Well, TFEU and these two Regulations provide rules regarding vertical agreements to be interpreted and applied and the CJ EU has the last word in this process. The last sixty years judiciary era proves a key role of the CJ EU and its readiness, often even willingness, to steer the wheel and to shape the legal framework and evolution, e.g. while using the self-made doctrine of supremacy and direct effect. It proves as well the CJ EU unwillingness to rethink and to review its previous positions[41] and its strong inclination for an extremely high "precedential" consistency. The judgment in *C-439/09 Pierre Fabre* exactly fits this description. A rather new situation arrived and the CJ EU did not hesitate to "go ahead" with an interpretation and application in a teleological manner and with the best intentions regarding the protection of competition and supporting IS/IT. This led the CJ EU to the message incorporated in *C-439/09 Pierre Fabre* that, in the selective distribution system based on vertical agreements, is hardly a place for clauses absolutely excluding Internet sales. Since, the CJ EU has maintained this conclusion and refers to the *C-439/09 Pierre Fabre.* Thus a no e-commerce clause in a vertical selective distribution agreement is likely to be found by the CJ EU as prohibited by Art. 101(1) TFEU and not saved by Art. 101(3) TFEU or by Regulation

[38] KING, Saskia. The Object Box: Law, Policy or Myth? *European Competition Journal*, 2011, 7(2): 269-296. ISSN 1757-8396.
[39] WHISH, Richard. Competition Law, 6th Edition, Oxford, UK : Oxford University Press, 2009, 1006 p. ISBN 978-0-19-928938-7.
[40] MacGREGOR PELIKÁNOVÁ, Radka. Potential Impact of the Famous Pierre Fabre Case on e-Business in the EU – The European Secret message about the significance of Domain names In: TULEJA, Pavel, and others (Eds.). *Conference Proceedings XII. International Scientific Conference Economic Policy in European Union Member Countries*, Ostravice, CZ, 16th-18th September, 2014, p. 594-605 of 1093. ISBN 978-80-7510-045-0.
[41] SVETLICINII, Alexandr "Objective justifications" of "Restrictions by Object" in Pierre Fabre: A More Economic Approach to Article 101(1) TFEU? *European Law Reporter*, 2011, 11, 348-353. Available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1991330

on a block exemption for vertical agreements. Such harshness and indirect imposition of e-commerce to private subjects participating in selective distribution of special products is discussible. Even more discussible are arguments indicated in *C-439/09 Pierre Fabre.* Indeed, they raise suspicions about the CJ EU fight against the "misery", i.e. avoidance or restriction, of e-commerce and they suggest that such an approach is counterproductive, interfering and suffocating IS/IT strategies of European businesses.

The judgment in *C-439/09 Pierre Fabre* was preceded by the opinion delivered by the Advocate General, Prof. Mazák. It provides a clear message and guidelines and represents an opinion shared by the Advocate General, judges of the CJ EU and even the Commission 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, and that such an e-commerce banning clause is not objectively justified and does not benefit by the block exemption for vertical agreements. Thus, according to the Art. 101(1) TFEU such clauses are *incompatible with the internal market*, because they *may affect trade between member States and …. have as their object of effect the prevention, restriction or distortion of competition within the internal market* and theoretically, the only (and very difficult) venue for survival of such clauses is to get an individual exemption based on Art. 101(3) TFEU.[42]

The wording of TFEU is not conclusive and allows several interpretations, for, as well as against, the prohibition of vertical selective distribution clauses banning e-commerce. *Prima facia*, the choice of the CJ EU to go ahead with rejection of contractual clauses prohibiting the sales via Internet seems as a good step towards the justified glory of e-commerce deserving to be protected against a miserable attempt to go back to the Middle-Ages, commercially, with old-fashioned downtown market places with merchants and to deny the wonderful cyber-world and digitalization, which are ostensibly advanced by the EU. However, intellectual property owners and beneficiaries using selective distribution channels have never wanted to avoid e-business. Suppliers and distributors have no interest in hindering new methods of distribution, they just want to freely figure out what is suitable and optimal.[43] The CJ EU disregarded this with its authoritative statement in point 54*"a contractual clause such as the one in the main proceedings, prohibiting de facto the internet as a method of marketing, at the very last has as its object the restriction of passive sales to end users wishing to purchase online and located …."* Contrariwise, Pierre Fabre Dermo-Cosmétique SAS („PFDC") has always been for Internet marketing and other sub-types of e-business, except e-commerce, and it would be total foolishness to avoid the use of the Internet to communicate the value of PFDC goods and services to customers or consumers and a Websites of PFDC as well as members of the PFDC selective distribution system are well-developed and heavily used. PFDC merely wanted to avoid mixing their genuine goods and services with fake, free-riding and/or counterfeited products offered on obscure Internet easily set by various pretenders and cybersquatters trying to parasite on their hardly built *renomé.* [44] The no e-commerce clause thus made clear that a

[42] THEMELIS, Andreas. After Pierre Fabre: the future of online distribution under competition policy. *International Journal of Law and IT*, 2012, 20(4): 346-373. ISSN 1754-243X.

[43] BUETTNER, Thomas. An Economic Analysis of the Use of Selective Distribution by Luxory Goods Suppliers, *European Competition Journal*, 2009, 5(1): 201-226. ISSN 1757-8396.

[44] MacGREGOR PELIKÁNOVÁ, Radka. Potential Impact of the Famous Pierre Fabre Case on e-Business in the EU – The European Secret message about the significance of Domain names In: TULEJA, Pavel, and others (Eds.). *Conference Proceedings XII. International Scientific Conference*

commercial Website with allegedly the PFDC portfolio is not genuine and the presented items are not true PFDC. In addition, it makes sense that superior cosmetic products need to come with professional advice tailored to individual needs of the clients, which might otherwise purchase PFDC cosmetic products totally incompatible with their skin with serious negative consequences. Sadly, this common sense analysis and message did not go across. The study of the final stage aspects of this case seems akin to a Greek myth scenario where the principal hero recognizes the danger, does all possible to avoid it, but the destiny (and Gods) inevitably lead to the catastrophe. Thus, it is illustrative and enlightening to shortly recapitulate the final milestones of *C-439/09 Pierre Fabre* leading to the tragic misunderstanding where the allegedly protected competition and IS/IT suffered a defeat.

Firstly, the case did not emerge based on any complaints from competitors or consumers, instead it was a free initiative of the French Antitrust Office acting on its own volition and persistently wanting to punish businesses agreeing about a distribution system not fitting its superficial understanding of the use of IS/IT. It is worthwhile to recall that, already in 1999, in another *Pierre Fabre* case, the Court of Appeal in Versailles overturned a lower court decision and ordered a pharmacist, an approved distributor in a selective distribution network for luxury products, to cease sales via the Internet while sustaining the validity of such a contractual clause.[45] Nevertheless, even the consistent case of law of national higher courts did not shake the intimated and permanent determination of the French Antitrust Office to assume the noble role of a knight fighting for the e-commerce, which in reality means Don Quixote fighting with wind mills. Sadly, the CJ EU boldly followed this pathway without carefully studying the situation and the evolution of IS/IT and their use, and thus saw in the restriction on e-sales not harmless windmills on the e-business scenery but scary antitrust s giants. The CJ EU succumbed to the temptation from the national office to go in the murky waters of strict national/regional public law regulation of something what is inappropriate for it. Certainly, the law applies to the Internet and cyberworld, but, at the same time, the Internet follows a decentralized multi-stakeholder governance and states should stay away from dictating who must use the Internet, and in what manner. Legislatively or judiciary pushing businesses to go for e-commerce is hardly an approach in compliance with Europe 2020 and even the EU primary law as such. Businesses should be invited and supported regarding R&D, the transposition of their outcomes into activities on the market, but businesses should not be forced to do so.

Secondly, the PFDC explained several times clearly that the ban regarding online sales is objectively justified by the major risk of an increase in counterfeit 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. This very convincing point fully reflecting current issues of domain names and search engine optimalization ("SEO") and the burning problems of imposters in the cyber-world and of dilution of intellectual property portfolio was rejected by the Advocate General, Prof. Mazák. He stated in his

Economic Policy in European Union Member Countries, Ostravice, CZ, 16th-18th September, 2014, p. 594-605 of 1093. ISBN 978-80-7510-045-0.

[45] KIRCH, Pierre. The Internet and EU Competition Law, *Journal of International Trade Law and Policy*, 2006, 5(1): 18-35. ISSN 1477-0024.

opinion "*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*." This Don Quixote´s idea of the impossibility of confusion on the Internet does not survive a Sancho Panza´s practical scrutiny based on the real Internet operation. Even a cursory Internet check of popular and attractive domain names can lead to an abundance of misleading, fake, etc. Websites. Many European consumers can testify about how easy it is to get confused by a pretentious Website 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 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.[46] Further, the entire perception of the "evil" character e-commerce ban clause as a restriction by *object* in this context by the CJ EU can hardly match with the Communication from the Commission – Notice 2004/C 101/08 Guidelines on the application of Article 81(3) of the Treaty which states at 21.-23. *Restrictions of competition by object are those that by their very nature have the potential of restricting competition ….As regards vertical agreements the category of restrictions by object includes, in particular, fixed and minimum resale price maintenance and restrictions providing absolute territorial protection, including restrictions on passive sale.* That is that, and it is clear that PFDC did not hamper with prices or territories and just wanted to have more quality sales and less counterfeiting.

Thirdly, the CJ EU seems to not only misunderstand the www and cyberworld in general, but as well it appears to be clueless regarding the amount of effort and finance to get a brick-and-mortar shop v. domain with Website. Prof. Mazák stated in his opinion " *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*." Well, the registration and renewal of domain name, the renting of the nameserver space and the cost linked to the creation and maintenance of a Website used for private purposes or for lower levels and sub-types of e-business are insignificant and reaching annually not more than tens or hundreds of EUR. A domain with a professional Website for an interactive advanced e-shop activities and even higher levels and sub-types of e-business entails higher costs, but still less than costs related to a brick-and-mortar shop.

Fourthly, the Advocate General suggested in his opinion that 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. However, how should this be done? There are 23 000 outlets, and Sancho Panza might suggest that it is an unimaginable misery to set up and operate an appropriate monitoring system. In addition, even if such monitoring would generate information

[46] MacGREGOR PELIKÁNOVÁ, Radka. Potential Impact of the Famous Pierre Fabre Case on e-Business in the EU – The European Secret message about the significance of Domain names In: TULEJA, Pavel, and others (Eds.). *Conference Proceedings XII. International Scientific Conference Economic Policy in European Union Member Countries*, Ostravice, CZ, 16th-18th September, 2014, p. 594-605 of 1093. ISBN 978-80-7510-045-0.

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. [47]

Fifthly, the CJ EU balanced two priorities – the protection of the undistorted competition and the protection of product packages and consumers, i.e. the conceptual and abstract value vs. the pragmatic operation and impact of it. This test ended clearly in favor of the first mentioned. Namely, the CJ EU in point 44 of the judgment reconfirmined its truly firm and concise attitude, 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. Certainly, the CJ EU has the right, perhaps even the duty, to pick between these two priorities, but this choice needs to be done based on an educated decision. The above mentioned raised serious doubts about the level of mastering of IS/IT by the CJ EU and, with a touch of exaggeration, it might be suggested that the CJ EU, with the best intention to protect the undistorted competition, brought serious restrictions on the intellectual portfolio management and IS/IT strategies of competitors. Thus ultimately in the name of the protection of the competition the CJ EU actually restricted the competition and insensitively intruded in the development of the Internet and especially the use of www. Nevertheless, the last four years showed that the CJ EU stays with its decision in *C-439/09 Pierre Fabre* and this decision, along with its arguments, is heavily quoted and commonly presented across the EU as a rejection of a clause banning online sales into vertical agreements, e.g. see point 70 of the judgment in *C-1/12 Ordem dos Técnicos Oficiais de Contas*, point 41 and 49 in the *opinion C-226/11 Expedia* delivered by the Advocate Generale, J.Kokkot (!), both opinion and judgment in *C-32/11 Allianz*, etc. 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.[48]

4. The academic views regarding similar restrictions in similar settings – "illusions perdues"?

[47] MacGREGOR PELIKÁNOVÁ, Radka. Potential Impact of the Famous Pierre Fabre Case on e-Business in the EU – The European Secret message about the significance of Domain names In: TULEJA, Pavel, and others (Eds.). *Conference Proceedings XII. International Scientific Conference Economic Policy in European Union Member Countries*, Ostravice, CZ, 16th-18th September, 2014, p. 594-605 of 1093. ISBN 978-80-7510-045-0.

[48] MacGREGOR PELIKÁNOVÁ, Radka. Potential Impact of the Famous Pierre Fabre Case on e-Business in the EU – The European Secret message about the significance of Domain names In: TULEJA, Pavel, and others (Eds.). *Conference Proceedings XII. International Scientific Conference Economic Policy in European Union Member Countries*, Ostravice, CZ, 16th-18th September, 2014, p. 594-605 of 1093. ISBN 978-80-7510-045-0.

The last four years confirmed the growing importance of e-business, including e-commerce, and the different approach to the interaction between antitrust and IS/IT issues and priorities on each side of the Atlantic. Recently, academic sources have suggested that the USA and EU perceive and deal differently with contractual restrictions of online sales. In the USA, it prevails a rather liberal approach towards distribution restraints, while in the EU a stricter and more rigid approach strongly marked by the by the mandates of the single internal market.[49] Each approach has advantages and disadvantages and is not *per se* good or bad, provided it is correctly applied based on solid knowledge and an appreciation of current (internal) market and IS/IT issues. Thus, the problem is not that the CJ EU, in the name of the EU, requires more significant compliance efforts for vertical agreements than what is required in the USA, and that it rigidly applies conventional antitrust rules, which were developed for a tangible setting, to an intangible cyber-world scenery. The problem is that the CJ EU provides explanations raising doubts about the CJ EU's understanding of the real employment of e-business in the internal market, and that the rhetoric of the Commission and of the CJ EU are contradictory. Perhaps the *C-439/09 Pierre Fabre* is compatible with Europe 2020, but so far nobody has shown it. The inevitable conclusion is that the pro-integration tandem splits in this respect. Manifestly, this is a very dangerous conclusion which can cause much more damage than whatsoever EU micro-management of vertical agreement clauses.

In addition to the dichotomy of the Commission and CJ EU attitude to IS/IT, especially the Internet, the professional press brought, in the last four years, re-occurring criticism about the denial of the protection of luxury and superior quality goods and services. According to Europe 2020, the very first European strength is the "*talent and creativity of our people"*, generating assets and values belonging to precious intellectual property. In other words, the EU's chief weapon on the global market battle field is its protected traditional and ongoing creativity, leading to the competitive advantage protected by intellectual property. EU subjects excel with inventive, high-quality products, often taking the intangible form and sometimes even reaching the luxury qualification, i.e. they do something which is perceived as a desirable extra value, despite a higher price. However, the *C-439/09 Pierre Fabre* rejected considering the higher need of protection of certain products and made manufacturers of luxury brands 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.[50] The academic press noted that the CJ EU became more strict than in *C-59/08 Copad* and *T-88/92 LeClerc*, and the aura of luxury linked to the quality of product lost its recognition and protection, and that no deeper explanation for this move was provided by the CJ EU.[51] More generally, it can be suggested that the CJ

[49] ACCARDO, Gabriele. Vertical Antitrust Enforcement: Transatlantic Perspectives on Restrictions of Online Distribution under EU and US Competition Laws. *European Competition Journal*, 2013, 9(2): 225-340. ISSN 1744-1056.

[50] SVETLICINII, Alexandr "Objective justifications" of "Restrictions by Object" in Pierre Fabre: A More Economic Approach to Article 101(1) TFEU? *European Law Reporter*, 2011, 11, 348-353. Available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1991330

[51] MacGREGOR PELIKÁNOVÁ, Radka. Potential Impact of the Famous Pierre Fabre Case on e-Business in the EU – The European Secret message about the significance of Domain names In: TULEJA, Pavel, and others (Eds.). *Conference Proceedings XII. International Scientific Conference Economic Policy in European Union Member Countries*, Ostravice, CZ, 16th-18th September, 2014, p. 594-605 of 1093. ISBN 978-80-7510-045-0.

EU seems to move away from its well established practice that both qualitative and quantitative selective distribution systems are exempted by the vertical block exemption selective distribution agreements whenever the market share does not exceed 30% and the selling is not restricted, see e.g. *C-26/76 Metro*.[52] The otherwise very consistent CJ EU in *C-439/09 Pierre Fabre* denied the benefit of this exemption, despite the fact that the market share was 20% and active selling was merely channeled, i.e. not restricted.

Finally, the categorical approach of the CJ EU to the selective distribution system is not matched by similar restrictions to similar settings. Firstly, franchising is well known by its fully internally determined IS/IT strategy, leading even to the unification of the Website use. For example, McDonalds franchisees do not even have their own domains and Websites, and this not a problem for the CJ EU and its application of Art. 101 TFEU. Franchising came to the Europe from the USA , just slowly earned success and recognition and perhaps until today the European perception of franchising is narrower than the American, and includes business-format franchising and not product franchising. Nevertheless, it cannot be denied that the CJ EU with "revolutionary" *C-161/84 Pronuptia* followed by the Commission with the Regulation 4087/88 regarding franchise agreements open the nationally locked doors to the franchising with restriction clauses to the Europe[53] and continued with a surprisingly liberal, modern approach. Secondly, pursuant to a well established legal doctrine and the CJ EU case law, Art. 101 TFEU does not apply to vertical agreements between legal persons forming a so called *single economic entity* and thus parent-subsidiary agreements may escape cartel prohibition and make the parent company liable for the activity of the subsidiary company, even if this subsidiary is not 100% owned by the parent company.[54] Thirdly, the EU perception, fully shared by the Commission and the CJ EU, of a rather blurred notion of *undertaking* provides an opportunity for legal internal arrangements regarding IS/IT strategies, including e-business methods and levels selection. As a matter of fact, the term *undertaking* has never been defined by the EU primary law and has always been critical for the application of the EU competition law. The issue of the relative concept of *undertaking* has been addressed by the CJ EU, which took the functional approach, see e.g. *C-309/99 Wouters*,[55] opening the door to a broad application of the EU competition law, with the correction provided by the above mentioned concept of *single economic entity*, see e.g. *C-73/95 Viho Europe BV*.[56] Interestingly, the concept of *undertaking* is currently undergoing an evolution shaped by the CJ EU, especially in relation to the legal liability regime, and so far it is unclear where this evolution aims.[57] This leads to a question about how independent these are? Maybe they are de facto very close to franchisees or members of a single economic entity or sub-parts of one undertaking. If yes, then this is true, then the *C-439/09 Pierre Fabre* arguments and

[52] EZRACHI, Ariel. *EC Competition Law – An Analytical Guide to the Leading Cases.* Portland, USA : Hart Publishing, 2008, 284 p. ISBN 978-1-84113-674-5, p.92-93.
[53] BODEWIG, Theo. Franchising in Europe – Recent Developments. *International Review of Intellectual Property and Competition Law*, 1993, 24(2): 155-179. ISSN 2195-0237.
[54] FRIČOVÁ, Vítězslava. Parental lability in cartel cases. *Antitrust – Revue of Competition Law*, 2014, 1, 19-21. ISSN 1804-1183.
[55] EZRACHI, Ariel. *EC Competition Law – An Analytical Guide to the Leading Cases.* Portland, USA : Hart Publishing, 2008, 284 p. ISBN 978-1-84113-674-5, p.1-11.
[56] EZRACHI, Ariel. *EC Competition Law – An Analytical Guide to the Leading Cases.* Portland, USA : Hart Publishing, 2008, 284 p. ISBN 978-1-84113-674-5, p.14.
[57] PELIKÁNOVÁ, Irena. Kam směřuje pojetí podniku v unijním právu a jak chápat právní subjektivitu ve světle judikatury Soudního dvora EU? *Antitrust – Revue of Competition Law*, 2014, 3, 87-93. ISSN 1804-1183.

underlying philosophy are illusory and internal contractual arrangements excluding online sales can hardly be conventionally banned by the operation of Art. 101 TFEU.

Conclusion

The Commission has a plan, and this is Europe 2020 based on multi-stakeholder communications, educated decisions and step-by-step moving towards smart, sustainable and inclusive growth inherently involving properly operating market competition and welcoming of IS/IT development and use. In this plan are few prohibitions or orders with respect to private subjects, especially SMEs. There is an invitation to e-business in all forms and all sub-types, without ordering that e-commerce must or must not be used.

The CJ EU has a plan and this plan is to proactively protect competition against any "strange" vertical agreement clauses restricting something around the Internet. In *C-439/09 Pierre Fabre*, the CJ EU made it clear that restrictions in using the Internet are bad and that the Internet is a complementary distribution. The academic press replied that such an approach does not respect the market evolution in the 21st century.[58] In addition, the consistency and compatibility of the well-established *C-439/09 Pierre Fabre* with the ultra-classic *C-26/76 Metro* broadly allowing the exemption to vertical selective distribution agreements is questionable. The Commission appears more open-minded and consistent regarding Europe 2020, but it is still occasionally balancing between the conservative 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.[59]

The EU is at a crossroads and the "forced" e-commerce pursuant to *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. *Tempora mutantur, nos et mutamur in illis*, yes indeed, "times change, and we change with them" as do our business methods, including distributing and selling methods. The selective distribution by vertical agreements has dramatically changed since 1951. Common wisdom suggests not interfering in something spontaneously evolving, not hurting others and potentially bringing innovation and progress.[60] Common wisdom suggests treating similar settings similarly, so if the franchising structure and single economic entity setting are allowed to synchronize their e-business endeavors, the same tolerance should be extended to quasi-franchized subjects which are almost parts of a single economic entity**.** Indeed, „*reddite ergo quae sunt Caesaris Caesari et quae sunt Dei Deo*",[61] yes, e-business methods and sub-types reflect private businesses and carry their virtual image and visions, so these private businesses should decide about them, should they not?! Even

[58] THEMELIS, Andreas. After Pierre Fabre: the future of online distribution under competition policy. *International Journal of Law and IT*, 2012, 20(4): 346-373. ISSN 1754-243X.

[59] MacGREGOR PELIKÁNOVÁ, Radka. Potential Impact of the Famous Pierre Fabre Case on e-Business in the EU – The European Secret message about the significance of Domain names In: TULEJA, Pavel, and others (Eds.). *Conference Proceedings XII. International Scientific Conference Economic Policy in European Union Member Countries*, Ostravice, CZ, 16th-18th September, 2014, p. 594-605 of 1093. ISBN 978-80-7510-045-0.

[60] BUETTNER, Thomas. An Economic Analysis of the Use of Selective Distribution by Luxory Goods Suppliers, *European Competition Journal*, 2009, 5(1): 201-226. ISSN 1757-8396.

[61] New Testament - Matthew 22:15-22 and Mark 12:13-17 "*Render unto Ceaser*…".

the best intended tail should not be wagging the dog. Post-modern society is based on the communications of all stakeholders and on the partnership between private and public sectors. Even the best meant regulatory micro-management is highly problematic and, if used, then a detailed and convincing explanation is needed. So far, such an explanation is missing for the CJ EU's rejection of mutually agreed clauses excluding online sales for selective distribution of high quality products covered by intellectual property and endangered by e-parasitism and by imperfect delivery to consumers.

Abstrakt

Rok 2010 je do určité míry milníkem post-lisabonské evropské integrační éry. Nejhlubší bod ekonomické a finanční krize byl překonán a Barrosova Komise s podporou Soudního dvora EU („SD EU") demonstrovala jasnou vůli se poučit z krize a přijmout opatření pro silnější a konkurenceschopnější EU na globální scéně. Charakteristickým prvkem tohoto dosud pokračujícího trendu je velmi konkrétní a pragmatická strategie předložená Komisí coby Com(2010)2020 final Communication from the Commission Europe 2020 - A strategy for smart, sustainable and inclusive growth z r. 2010 ("Evropa 2020"). O rok později vydal SD EU velmi jasný rozsudek v *C-439/09 Pierre Fabre Dermo Cosmétique SAS v. Président de la concurrence ("C-439/09 Pierre Fabre")*. Není pochyb, že Evropa 2020 i *C-439/09 Pierre Fabre* jsou jednak uznávané, opakovaně potvrzené a dosud platné, a dále že se zaměřují na jednotný trh, moderní informační systémy a moderní technologie ("IS/IT") a jejich vzájemnou interakci. Jsou ale vzájemně slučitelné? Podporuje *C-439/09 Pierre Fabre* skutečně všechny tři priority, pět cílů a sedm vlajkových iniciativ Evropy 2020? Vnímá pro-integrační tandem, Komise a SD EU, stejně využití IS/IT na jednotnému trhu? Jsou podobné vertikální systémy, jako např. frančíza, jediná ekonomická jednotka nebo holding, upraveny podobně? Překvapivě, odpovědi na tyto otázky jsou spíše negativní než pozitivní a naznačují nedorozumění a/nebo problém, kdy detail či následek řídí celek. Možná na podnět francouzského antimonopolního úřadu zašel SD EU v nejlepším úmyslu příliš rychle příliš daleko, aniž by si uvědomil, že ultimatum uložené orgánem veřejné moci ohledně nehmotných a stále se vyvíjejících IS/IT je rizikem a potenciálem pro irelevantnost a snížení konkurenceschopnosti a inovativnosti. Vzájemný vztah IS/IT a vnitřního trhu představuje jemný a křehký mechanismem a rozhodně se vyplatí hluboce myslet dvakrát, dříve než se přistoupí k lákavým prostředkům zahrnujícím kogentní rozhodnutí a tzv. konečná řešení. Ostatně v kolébce IS/IT, Internetu a e-commerce, v USA, panuje podstatně liberálnější přístup a USA právo na ochranu soutěže je rozhodně méně striktní ohledně ustanovení omezujících distribuci, offline a online, než EU právo na ochranu soutěže. Nevede vůle EU užívat soutěžní právo k podpoře jednotného vnitřního trhu v pojetí SD EU „*à la*" *Pierre Fabre* k nepochopení e-commerce a nepůsobí v konečném důsledku proti-růstově a proti-soutěžně?

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