



## 15th BILETA Conference: “ELECTRONIC DATASETS AND ACCESS TO LEGAL INFORMATION”.

Friday 14th April 2000.

University of Warwick, Coventry, England.

# Electronic Commerce and Closed Distribution Networks: Proposals for Solving Legal Problems

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**Abstract:** Developments of the World Wide Web and electronic commerce upset the traditional marketing schemes. This disruption is moderately appreciated by the producers who have built "closed distribution" structures, such as exclusive concession or selective distribution networks (ie within car industry sector (Peugeot, Rover...) and within the perfume sector (Chanel, Yves St Laurent...)).

These networks consist of authorized dealers selected on specific qualitative criteria and "disguised" quantitative criteria. The producers are particularly attentive to potential "free riders" offences. In other terms, they do not wish their products be resold outside the network. This legally framed marketing model is underpinned with contracts that define the terms and conditions of sale.

Producers have the opportunity to take legal action against the authorized dealer who does not respect these conditions (especially the condition prohibiting the resale of products outside the network). They can also undertake proceeding against the free riders, arguing that their behaviour provoke unfair competition.

This development perturbs the legal organisation of the networks and generates new questions:

\* Does the authorized dealer commit a fault by selling or simply promoting the products on the WWW? Does this behaviour constitute a breach of contract?

\* Does the free rider commit an act of unfair competition by selling or simply promoting the products on the WWW?

\* Do the existing contracts offer sufficient security, in relation to electronic commerce?

\* In an international environment by nature, what are the legal rules to be applied to possible litigation? This question is important, knowing that closed distribution networks are well protected by French Law. It is not necessarily the case in other countries within the EU.

\* Could a web site be considered as a point of sale, integrated to an exclusive or selective network? If this is the case, how will the contract take the specific nature of this point of sale into account?

In this paper we analyse the global problem caused by the confrontation between closed distribution networks and electronic commerce. We show how producers could respond with legal tools, knowing that it is a strategic issue for them. We try to propose legally secured and efficient operational solutions.

**Keywords:** Competition, unfair competition, fine fragrances, cars, closed distribution, electronic commerce, contracts, trademark law, selective agreements, exclusive agreements, free riders, electronic point of sale

## Introduction

Many producers use closed distribution networks to market their products. Some lines of businesses are particularly suited to the development of this type of network, i.e. the automobile industry, high-tech products, fine fragrances, jewellery, etc. Although the contracts which define the legal framework for these networks can vary (authorized retailer contracts, franchise contracts, exclusive dealership contracts), they all have in common that they provide producers who use them with a business organisation without having to create and own a costly physical infrastructure of branch offices[1]. These distribution networks are based on a selection of resellers and on requirements set by the producer, i.e. the ability to respect the corporate identity of the producer's products and sales practices, the ability to conform to a certain stock mix, or the ability to guarantee a consumer service department. It is also important for the producer that distributors follow a pricing policy that is consistent with the marketing strategy and the brand image of the goods.

These networks are called "closed" because they prevent *a priori* any reseller outside the network from getting a supply of these products. The configuration and operation of closed distribution networks (or integrated distribution) vary based on the Members States of the European Community, not to mention the differences with the United States (and even between federal states), and Japan.

The confrontation between the logic of a distribution system reserved to a few resellers selected by producers (for points of sale that suit a geographical positioning strategy), and the development of the Internet was foreseeable. In fact, the Internet transcends all geographic barriers and frontiers[2].

The point of sale becomes virtual, and the outlet is electronic. Access to the store window and products is unlimited, available to any customer, at any time, anywhere. The Internet is a prime example of an open network which shatters the organisational logic of integrated distribution networks. Producers may fear excessive on-line promotions of their products which they find impossible or too costly to control. In addition, a coherent strategy of resale prices set by the producer could be significantly affected by the distortion of prices due to multiple offers available on the Internet[3]. Finally, the Internet offers parallel distributors (those who sell their products without belonging to the producer's network) a significant opportunity to expand their business strategy to a larger number of consumers.

These developments are a cause for concern for producers, unless they anticipate them and integrate the opportunities in a business strategy and a legal framework. Producers need to urgently deal with this last point because e-business is evolving more rapidly than the law.

## **Part I: Legal Framework of Sales on the Internet by a Network Member**

### **Section 1: Distribution Networks: Legal Requirements**

Legal requirements can vary from one Member State of the European Community to another, depending on the legal and business organisation selected by the producer. This form of business organisation may also vary based on some elements, such as the distribution and consumption trends of the country, or the size of the market. For example, fine fragrance producers distribute their products in France via a network of independent distributors, while in Ireland the distribution of the same goods is granted to an exclusive agent who must find authorized retailers[4]. Our discussion focuses mainly on the requirements for French retailers because it is the market with the greatest number of requirements.

#### **A) Requirements to Enter the Network**

##### **1. Requirements for Entering the Selective Network**

Selective distribution, as implemented in France, is primarily characterised by a qualitative selection of distributors that may be very strict. This qualitative selection may come with an indirect quantitative selection without any exclusivity granted to the authorized retailer. The primary objective of the producer is to protect the quality of distribution, and to preserve corporate image. If we look at selective distribution contracts used in France by some well-known producers of fine fragrances (Yves Saint-Laurent, Chanel, Lancôme, Dior, etc.), we can notice three large categories of selection criteria:

- \* the location and organisation of the point of sale;
- \* the range of a product line;
- \* the respect of certain requirements relating to the qualifications of the sales staff.

Specifically, the producer can demand from authorized dealers that the status, store sign, and environment of their points of sale match the prestige and brand image of the products. Producers can also ask dealers to offer advice proportional to the size of the store and the volume of products offered[5].

##### **2. Requirements for Entering the Exclusive Network**

The need to set up an efficient marketing and sales system suited to the product is even more important when other related services (technical advice), and mainly subsequent services (installation, maintenance, after-sale service) must be offered. This is particularly the case for automobiles, a complex, costly, and durable consumption good. The specialisation of the distributor is technical, and not only related to the product image even if one does not exclude the other. Setting up an automobile dealership also requires significant investment, which in turn require a quantitative selection of resellers. These resellers enjoy an exclusive supply (territorial mandate) in the trading area defined in the contract. They are then protected from any direct competition.

## B) The Network Validity Terms Under Competition Law

The legal framework set forth by selective or exclusive distribution contracts, which we briefly described, is by nature, or further effect, likely to clash with the rules of competition law. If we look at the most important point, such contracts represent a vertical agreement which implies a discrimination among retailers who belong to the network, and the others. The debate takes place at two levels: at the national level, where the network impact on competition within the national market (for example, France or the United-Kingdom) is examined, and the Community level where the impact is then measured through business between Member States. Since these networks often transcend national borders, producers tend to get their networks validated at the level of the EC[6] [www.mmc.gov.uk/342.htm](http://www.mmc.gov.uk/342.htm).

In the area of selective distribution, some producers have won individual exemptions before the Community Courts (including Yves Saint-Laurent Parfums)[7]. In summary, the European Commission has validated objective qualitative criteria by considering that they do not constitute a limitation to competition. The Commission has also waived certain clauses of the contract which *a priori* constituted a limitation to competition, but for which the economic balance sheet was favourable[8] by reminding that some "questionable" clauses or practices would prevent any exemption[9]. Finally, it is worth noting that the European Community has also ruled in favour of clauses prohibiting resellers from selling the products by mail provided that they do not *a priori* exclude modern forms of distribution.

As for automobile distribution contracts in Europe, they fall under a specific exemption regulation, EC Regulation N. 1475/95 in force until 2002. This regulation provides a *black list* of clauses and practices which, if observed in the relationship between the manufacturer and the dealer(s), can result in the automatic loss of the exemption benefit. For example, a distributor cannot refuse the purchase offer of a consumer, nor can he demand a higher price simply because that consumer lives in another Member State. The manufacturer and all distributors within its network must guarantee, maintain and repair a car of their brand name, whatever the place of purchase in the common market.

These different analyses of acceptable or unacceptable distribution terms as regards free competition game within the EC can also be found in the EC Regulation N. 2790/99 of December 22, 1999, concerning the application of Article 81, paragraph 3, of the Rome Treaty applicable to vertical agreements and concerted practices[10]. This block exemption applies to all distribution agreements involving vertical competition restraints, including selective distribution contracts and exclusive dealership contracts (but the regulation expressly excludes distribution contracts involving automobiles which fall under a different regulation, until at least 2002.). However, this regulation is not without risk. It also provides for the Commission to withdraw the exemption benefit if parallel networks of vertical agreements produce similar effects that significantly limit access to, or competition on, the market. Selective distribution networks set up by fine fragrance producers are herein implicitly targeted.

## Section 2: Compatibility between Internet Sales and Network Membership

### A) Legal Arguments Available To A Producer Running A Selective Distribution Network

The phenomenon of Internet sales by members of a selective network of products supplied by the network producer is novel. But this type of business will surely develop, and producers will need to look into the legal arsenal to protect themselves. If they do not anticipate these developments, they risk litigation whose conclusions remain uncertain<sup>[1]</sup><sup>1</sup>.

To better understand the scenarios that might develop, we suggest the following decision tree, based on one hypothesis:

\* Hypothesis N.1: The web site is an on-line sales site.

\* Hypothesis N.2: The web site is an on-line presentation site of merchandise, without sales (we won't treat this hypothesis)

Hypothesis N.1 can be formalized as follows:

**The first of these sub-hypotheses (Hyp. N.1-1)** occurs when the selective distribution contract does not include a clause prohibiting or strictly regulating mail order resale, or remote Internet sale by a network distributor. Obviously, it is the most worrying case for the producer. If the contract does not anticipate this situation, the producer will have to demonstrate why such an on-line sale undermines the distributors' obligations towards it, as stipulated in the distribution contract.

Generally, the producer demands that some criteria relating to the presentation and the environment of the products be respected. The point of sale must be identified as a space specialising in the sale of fragrances and beauty items. It must be permanent, and the brand products must be offered in accordance with their prestige and reputation. Access to the point of sale must be well defined so as to offer the necessary advice and demonstration services. The distributor must always present the brand items in a satisfying environment, and the staff must have the necessary qualifications. The point of sale must be equipped with inside or outside windows that are big enough to support the brand's advertisements. The presentation of the merchandise must be entirely independent from that of other competitors, or other brands likely to damage the image of the producer's name, etc.

When specific contractual terms prohibiting the on-line sale or mail-order sale do not exist, the producer can find another argument in his clauses to justify the fact that this type of sale goes against the scope of the commitments undertaken by the distributor. The web site's lack of prestige (i.e. the gap between its aesthetics and the information provided), the poor display of the products (poor quality of the photos, slow access to the site, etc.), the lack of qualifications of the site operators (are they advisors in aesthetics and beauty?), the lack or insufficiency of advice (immediacy and adequacy of the answers to the cyber customers' questions) are considered part of contractual breaches that the producer can accuse the distributor as having committed as long as their appreciation is objective. Nevertheless, as we will see later, it is in the producer's interest to include in contracts the possibility of on-line sales of its products by a distributor and to adapt the clauses to the very nature of the electronic point of sale.

**The second of these sub-hypotheses relates to Hypothesis N.1-2**, i.e. the distribution contract includes a clause that prohibits the mail-order sale of the merchandise by the distributor. Here, we must anticipate two sub-hypotheses depending on the type of web sale (i.e. active or passive). By mail-order sale, we refer to a remote sale made to a customer after he/she received and read a catalogue or a brochure<sup>[1]</sup><sup>2</sup>. The mail-order sale thus implies an active process on the part of the distributor vis-à-vis the customer. It only constitutes a sub-part of the remote sale defined by French law as "*any technique enabling the consumer, outside the usual customer reception places, to order*

*an item or to request a service. Telematics, telephones, video-transmission, postal transmission and mass mailing are considered remote communication techniques" (Article 14 of the December 3rd, 1987 order, JO of Dec. 10, 1987. See also the European directive N. 97/7/CE of May 20th, 1997).*

If the distributor did not try to attract consumers to its web site, for example by sending information through e-mail (whose tracking is facilitated by cookies), it seems disputable to interpret such sales as mail-order sales[1]<sup>3</sup>. The prohibition clause of mail-order sales becomes irrelevant, which brings us back to Hypothesis N.1-1 previously analysed.

On the other hand, if the distributor maintains an active strategy to attract consumers to a site, we can interpret this sale as a mail-order sale. We still need to know if the producer can *a priori* exclude some type of distribution considering the applicable competition rules. The European Commission, followed by the CFIEC, has considered that selective distribution contracts cannot *a priori* exclude some modern forms of distribution[1]<sup>4</sup>. However, it agreed that the contractual prohibition imposed on the distributor to sell the producer's merchandise by mail could be justified considering the nature of the items. If this justification is invoked, the exclusion clause for mail-order sales does not constitute a problem for competition law. A breach of this clause could then constitute a legitimate reason to terminate the distribution contract[1]<sup>5</sup>, possibly with damages payable by the distributor to the producer, and the obligation to stop the merchandise sale via the web site.

But the analysis of such a case is not that simple. If we assumed an on-line sale as being a mail-order sale, the distributor can try to demonstrate that he has the necessary technical means to guarantee the proper distribution of the merchandise, compatible with their nature and/or their prestige[1]<sup>6</sup>. These means are clearly different from those available to the distributor in the context of "traditional" mail-order sales. The distributor who sells on-line may use on-line advice using images and other graphics or even visio-conferences (see Part 3). To conclude, it would be a mistake to promptly equate on-line sales with mail-order sales. We first need to take a good look at the quality of the distributor's web site, and more particularly to the effort put into satisfying the information requests issued by customers.

**The last case to be analysed corresponds to Hypothesis N.1-3.** The selective distribution contract includes a clause prohibiting remote sales, or more precisely, sales on the Internet. The same analysis as the one developed for Hypothesis N.1-2 (second sub-hyp.) can be applied. Our study of some selective distribution contracts in the fragrance industry does not show the existence of such a clause. However, it appears that perfume producers wonder about the opportunity to include one since such clauses are being used in other industrial sectors (brand name clothing, for example).

#### *B) Web Sales Through An Exclusive Network : The Case of Automobile Distribution*

The hypothesis of an Internet sales site of new cars by a dealer belonging to the manufacturer's distribution network may seem more marginal than the previous case. Several arguments though favour this idea:

- Cars are a peculiar product whose purchase is *a priori* less compatible with the exclusive use of the Internet.
- The relationship between automobile dealers and their licensors is based upon such a dependency that their flexibility is *de facto* quite limited, particularly in the case of an electronic distribution channel.
- The legal framework of automobile distribution, as provided in the European Community exemption regulation, enables manufacturers to prohibit their dealers from promoting or actively selling outside their territories. The question is: Is a web site part of this notion of "promotion/active

sale"?

We will look further at each of these elements.

1. As far as cars are concerned, the purchase process is complex and highly involving in financial terms: cars are among the most expensive single items which consumers ever buy (except housing). The purchase process is also highly involving in psychological terms: cars buying remains an emotionally involving process, far from purely rational. For those reasons, the Internet does not appear as an alternative sales channel in the full sense of the term (I. e. through to the transaction) for car market. But the Internet can more probably be a purchase facilitator, at the different stages of the decision process. The Internet can still be considered a tool to effectively proceed to the final transaction when some steps of the purchase process are done outside of the Internet. Therefore, the complexity of the purchasing process of a car should not be considered as an obstacle to the development of new car sales sites by dealers.

2. We can draw a stronger argument from the fact that the power of manufacturers on distribution networks is certainly more important than in the case of selective distribution where the certified retailer is less integrated in the distribution process set by the producer than in the area of automobile distribution. More generally, the relationship between automobile manufacturers and dealers is based on a dependency and a subordination of the latter vis-à-vis the former. If a dealer decides to integrate such a sales channel, it will essentially be within a uniform process designed and implemented by the manufacturer heading the network.

3. Finally, the European automobile distribution system is based on a geographical division of markets, each being operated by manufacturers. This translates into the attribution of a territory to each dealer who enjoys the resale monopoly of the brand products. To guarantee the coherence of this territorial mandate system, the manufacturer must see that dealers do not develop an "aggressive" business attitude towards the neighbouring territories. Therefore, all are prohibited from "actively" promoting, prospecting and/or selling outside their territory. However, because these clauses limit competition, Regulation 1475/95 provides for the active canvassing by a dealer outside his territory. It seems that a manufacturer can contractually prohibit dealers from canvassing outside their territories through the use of personalized advertisements. Manufacturers do not hesitate to use this right granted by the exemption regulation, as confirmed by our survey of contracts. On the other hand, we can conclude that all canvassing means, outside of the territories, based on other means than personalized advertisement are allowed. The European Community's explanatory brochure outlines some examples of personalized canvassing potentially outlawed: door-to-door canvassing, mass mailing, use of the telephone or *any other telecommunication means*. The Internet is certainly one of them, but we can wonder whether it is a means of telecommunication relating to an active and personalized approach. Obviously, the simple creation of an Internet site by a dealer cannot be considered as personalized advertisement (except if it transits through cookies which target some Internet users). On the contrary, an Internet site is directed to the public at large, and no one in particular. It is only an interactive window. We will agree that such a context does not encourage dealers to develop, on their own initiative, new car sales sites through the Internet.

Nevertheless, the hypothesis of the creation of a new car Internet sales site by a dealer cannot be *a priori* excluded even if its occurrence remains marginal. The clause prohibiting active canvassing outside the dealer's territory cannot be an excuse for the manufacturer to prohibit the creation of a sales site by a dealer. Also, a clause in the dealership contract that would prohibit dealers from creating web sites would probably prevent the network from enjoying Community exemption, whose interpretation is strict. Contracts do not currently (and cannot, considering the legal system specific to the automobile distribution) include specific stipulations to this regard. The case in which a manufacturer would have to legally object to the creation of a sales site by a dealer is very similar to that mentioned earlier (A, hypothesis N. 1-1), particularly in regard to the prestige and advice clauses.

# Part II: Legal Framework of Internet Sales by a Network Third-Party

"Closed" distribution networks always generate parallel resale. A genuine parallel market has developed with the objective of offering European consumers brand-name items outside of those networks and at lower prices. This phenomenon called "grey market" is very important in areas such as fine fragrances, clothing, or electronics.

## Section 1: Legal Analysis of Parallel Resale Behaviours

### A) Parallel Resale and Selective Distribution

In the area of sales which are parallel to a selective distribution network, we are faced with two hypotheses. The first one is the resale in one or several Member States of the EC by a distributor approved by a producer, but who does not belong to one of the producer's selective networks within the European Community. For example, this could be a distributor who has been granted the distribution of the producer's products in Malta, Russia, or Ukraine, and who then imports the merchandise within the European Community<sup>[1]</sup><sup>7</sup>.

The second case is the parallel resale in one or several Member States of the EC by a network third-party who does not have a contract with the producer for any territory.

A real parallel resale market (grey import market) has developed because of the high prices of luxury products within selective distribution networks. The Committee on Trade and Industry, in its Eighth Report, noted significant price gaps for identical products between the United Kingdom and the United States<sup>[1]</sup><sup>8</sup>. Such differences have led some distributors whose initial request to enter a selective distribution network was rejected by producers to get their stock through parallel importers. In fact, some brands have entered the European market through parallel imports (Tommy Hilfiger, for example). For others, the grey market in the fragrance industry represents about 25 to 30% of global sales.

It is appropriate to define the legal means used by producers to combat parallel resales. Trademark law constitutes a privileged instrument available to producers. As owner of a brand name affixed to its products, the producer can object to any illegal use of them. Here national laws can be applied. However, Community law is far from being foreign to this problem. In fact, the exclusive proprietary right that the producer has over its brands can conflict with the principle of free circulation of merchandise within the EC (it is the same for copyrights). To settle this conflict, the European Court of Justice has set up a legal framework based on Article 30 of the Treaty of Rome, and Article 7 of Directive N.89/10 dated December 21, 1988 which reconciles the trademark legislation of Member States. This legal construction leads to the principle of Community exhaustion of trademark law<sup>[1]</sup><sup>9</sup>.

To summarise, a producer heading a selective distribution network can legitimately claim his right to the brand to stop the importation in an EC State of a product labelled as originating from a third-party State, even if the said merchandise was marketed in this third-party country by the producer, or with the producer's agreement. Whether the distributor trying to resell the product in the EC is an absolute third-party to the network, or a distributor with a distribution right of the said product outside the EC does not affect this principle. This principle also applies to advertisement. The simple fact of announcing a product sale in a catalogue or in some advertisement equally infringes on the producer's trademark right. The producer may take legal action in the national jurisdictions on the basis of trademark laws to stop the parallel resale, and to have the products seized.

However, the rule regarding trademark expiration (and that of copyright) is not applicable when the producer who owns the brand name can put forward a legitimate reason, such as the modification or transformation of the product, or in case of an advertisement affecting the value of the brand by jeopardizing the prestige and image of the products involved. The very existence of a selective distribution network is not considered as sufficient reason.

Beyond the recourse to trademark law, in some countries, the producer can draw on unfair competition law to object to the parallel resale of its products. This is particularly the case in France where the Court of Cassation on several occasions sanctioned parallel resellers or importers when they were unable to prove their procurement sources, and their invoices issued by dummy corporations were judged insufficient<sup>[2]<sup>0</sup></sup>.

## B) Parallel Resale and Exclusive Distribution

Whether it is direct sales from the manufacturer to staff, fleets of companies or professional car-rental agencies, it is estimated that 40 % of car production is sold outside the dealership channel.

Of course, manufacturers and dealers have tried to legally prevent the development of these *free riders*. The argument they developed can be outlined as follows: a) when they comply with the provisions of the Community regulations applicable to the automobile industry, exclusive distribution contracts are exempted from prohibition. b) From the moment the contracts are exempted, they are enforceable against independent resellers, particularly because they reserve the exclusivity of the resale of contractual products to licensed dealers only. The first legal claims brought by manufacturers and their dealers, who felt victimized by off-network resellers, were based on this reasoning. Their objective was to obtain a decision that would prohibit off-network resellers from selling new vehicles.

Two landmark decisions were taken at the Community level to deal with this argument<sup>[2]<sup>1</sup></sup>, from which it is clear that, while Regulation n° 1475/95 concerns the contractual relations between suppliers and their approved distributors, it does not serve to regulate the activities of third parties who may operate in the market outside the framework of distribution agreements. In other words, the exclusive motor vehicle dealership contracts cannot be relied on as against third parties.

But in many countries of the EC, judges have passed judgments against some aspects of off-network resale. In France, the judge sanctions independent resellers when they refuse to reveal their procurement sources. The off-network reseller can also be sanctioned in case of a misconduct not related to the independent resale activity *per se*, for example misleading advertising (about the extent of the warranty for example), illegal comparative advertising, unfair competition acts (economic parasitism of resellers who present themselves as "specialists" of such or such brand), etc. On the other hand, trademark law is virtually unused by manufacturers, probably because most independent resellers get their supply within the EC (hence the enforceability of the principle of Community exhaustion). Obviously, it is easier to transport perfumes than automobiles at the international level. It is worth mentioning that the importation of new vehicles from non-European countries is often done in collusion with manufacturers<sup>[2]<sup>2</sup></sup>.

To conclude, we will emphasize that contrary to what we have seen in the selective distribution (and more particularly in the fragrance industry), it appears that the economic and legal framework of automobile distribution generates judicial decisions that favour the activity of independent resellers.

## Section 2: The Impact of the Internet on Parallel Resale Behaviours

## A) Legal Approach of On-Line Parallel Distribution In The Fragrance Industry

The application of the above-mentioned jurisprudence of trademark law - and more specifically of trademark right exhaustion - to on-line sales presents an "amusing" paradox. The theory of Community exhaustion of trademark right (which lies in a business notion based on territory, if not border) does not seem compatible with the very nature of the Internet.

**The first hypothesis** is very simple. The parallel reseller uses a web site to offer products that were acquired through a network distributor within the Community. The parallel reseller can plead trademark right exhaustion to the producer. However, we have seen that national jurisdictions remain free to accept the illicit use of the brand, depending on the provisions of their internal legal system, if the producer establishes the existence of a legitimate motive. In our opinion, such a motive could lie in the poor presentation of the goods, or in incompatible site layout which would seriously affect the brand image. In fact, such a demonstration can only succeed if the evaluation criteria of the site presentation are identical to those required from network distributors for on-line sales (we will return to this issue in Part III). For this first hypothesis to be valid, the parallel reseller must establish the Community origin of its supply.

The legal analysis of the **second hypothesis** is more complex. In this case, goods do not originate from the European Community. The parallel reseller acquires them through a distributor outside the Community. The issue at hand is to know from what moment on can we consider that the reseller markets the merchandise on European territory while at the same time the producer's trademark right is not exhausted.

By *introduction on the market*, we refer to the marketing of goods, which means that products are offered in response to the pull of market forces. In our case, we think that products are marketed from the moment they are available for purchase on the reseller's web site. The notion of *introduction on the market* only has meaning if we look at it from an economic standpoint more than from a "physical" standpoint. The marketing (or economic release) of goods does not occur when products are delivered to customers, but when they are offered to the pull of market forces, and before the sales contract takes shape<sup>[2]</sup> [www.droit.umontreal.ca/~gagnonc/travaux/consentement.htm](http://www.droit.umontreal.ca/~gagnonc/travaux/consentement.htm) <sup>[1]</sup> [www.lex-electronica.org/articles/v5-1/thoumfr.htm](http://www.lex-electronica.org/articles/v5-1/thoumfr.htm)<sup>[1]</sup><sup>3</sup>. If we pursued this analysis, it would imply that the introduction on the market occurs from the moment the sale offer is presented on the web site. The following question immediately arises: on which geographical market does this offer take place? We could answer in a very analogical way by claiming that the offer is made on a web site located in a given country. But this answer goes against the very logic of the *new electronic economy* (e-economy). The offer is global because it can be accessed from anywhere, including European. In this case, we can then state that the introduction on the market, or marketing, takes place within the European Community.

Producers can also try to find recourse in unfair competition law to impose sanctions parallel resellers who execute on-line sales of their products by. This assumes that there is national legislation that can be applied. Again, we must consider the means available to producers to enforce a decision that would favour resellers, if the site resides in an "accommodating" country or in a country where the legislation has no provisions for the afore-mentioned notion. In the case we are dealing with, it is worth mentioning that we are still faced with the now classical question (for behaviours relating to the web) of private international law: Which law must be applied? Before which judge? What are the chances of obtaining meaningful remedies?

## B) Legal Approach of On-Line Parallel Distribution In The Automobile Sector

Today, the Internet offers more sites dedicated to the **purchase** of new motor vehicles than sites dedicated to the **sale** of the same goods. Following is an examination of the reasons for this.

By sites dedicated to the **purchase** of new cars, we refer to sites that take part in the complex acquisition process of this type of product: technical information, comparative tests, comparison of cost, financing, insurance, etc.

Other sites are dedicated to the **sale** (in the broad sense of the term, it would be best to talk about *business*) of cars. In this domain, we must draw the following sub-distinction:

- The Internet is used by independent operators who do not engage in the business of strictly reselling (buying to sell).
- The Internet is used by independent operators who engage in the business of reselling in the strict sense of the term.

It is within the first category that the use of the Internet is most frequent. These operators' activity is founded on classical legal formulas, i.e. mandate or brokerage:

- The agent is responsible for buying a vehicle on behalf and for the account of the final consumer on the basis of an express mandate. This activity is fostered by the regulatory framework applicable to the automobile distribution.
- The broker's job is merely to put two potential contracting parties (the seller and the buyer of the new automobile) in contact with each other. This is the most common type of business on the Internet. It started in the United-States with Auto-By-Tel, which offers member dealers the opportunity to respond to the information requests by users of this service. In France, Auto Valley negotiates the best prices with the largest dealers.

Both types of activity are not legally open to criticism (the agent's business is even favoured by Community law), except in the classical yet marginal case where the independent operator contributes to a risk of confusion and parasitism, for example by giving the impression that there is a business connection between the independent operator and the manufacturer. Finally, for these independent operators, the European Community Court of Justice clearly decided in favour of the right to use the brand name of an automobile manufacturer in advertising<sup>[2]</sup><sup>4</sup>. On the whole, the use of the Internet does not affect the legal approach of this type of business.

Cases where the web is used by an independent operator engaging in a strict reselling activity are fewer. We find ourselves in the above-mentioned hypothesis of new car sales by an independent distributor where the use of the Internet does not fundamentally affect the issue. In the automobile industry, we have seen that the activity of independent resellers enjoyed an *a priori* favourable jurisprudence that compensates for the anti-competition effects of the manufacturers' exclusive networks. Nothing should stop this favourable treatment from being applied to on-line sales of automobiles by independent operators: even if the means are different, the problem remains the same.

However, the following distinctions must be drawn:

- Cars sold by independent operators which were legally acquired within a Member State. This is the most common case which brings us back to the analysis developed in Part III, Section 1, B.
- Cars sold by independent operators which originate from a third country. This case is less frequent, but cannot be excluded. Manufacturers could draw on trademark law to try to object to such activity in the terms described for the fragrance industry (Part II, Section 1, A and Section 2, A). To our

knowledge, such legal action is extremely rare in the automobile industry for reasons that are probably more factual and strategic than legal<sup>[2]</sup><sup>5</sup>.

In any case, whether we are dealing with selective or exclusive distribution networks, producers may find themselves defenceless when faced with the on-line sale of their products by parallel distributors, unless, for example, an international standard is created for trademark right exhaustion. This is one more element that should urge producers to think over the type of contract they use as a framework for on-line sales by network distributors.

### **Part III: Legal Framework for Setting Up an Electronic Sales Network**

## **Section 1: The Contract as Legal Framework for the Electronic Point of Sale**

Beyond the legal parameters that we will consider in this section, the decision by producers heading a network to organise the on-line distribution of their products will obviously depend on strategic and marketing factors. Based on the market, the type of products, or the brand image, producers will be able to choose from one of the decisions that we are going to discuss.

### **A) The Contractual Framework of On-Line Sales of Fragrances**

**The first choice** for the producer is to use the Internet only as a promotional and informational tool without any on-line sales of its products (which is currently the case for brands like Chanel or Dior). In this hypothesis, the producer will see that the contract does not allow for the distribution of its products on a web site. Such a contractual prohibition represents a risk in regards to Community jurisprudence (see Part II, Section 2). The producer will have to justify the prohibition based on the very nature of its products (for example, consumers cannot really discover the product on the web; contact with the product must be real, not just virtual; the product requires personalised advice that remote communication cannot entirely satisfy, whatever its level of interaction and synchronism, etc.) and/or by its image which conveys a strong notion of luxury which is incompatible with a virtual point of sale. If the producer is not able to establish this evidence, the validity of these contracts under competition law may be called into question.

**The second option** for the producer is to directly and personally assume the on-line distribution by creating its own web site. Nevertheless, it might be more of a problem for competition law (see, Section 2 below). However the producer could probably require distributors to guarantee product storage, and delivery to the customer (after on-line order and payment), as well as after-sale service<sup>[2]</sup><sup>6</sup>.

**The third option** for producers is to authorise distributors outside the European Community (or those granted a territory outside the EC) to sell products on the web provided that some contractual terms and specifications relating to the layout and aesthetics of the site be respected. Such a choice could be justified by the fact that the distribution network developed by the producer strictly satisfies specific conditions within the European Community that are much more relaxed outside the EC. However, the resulting problem of such a choice is obvious: the "ex-EC" distributor could attract customers residing in a Member State at the expense of network distributors organised within the Community.

The on-line distribution contract set up with the distributor must include a clause prohibiting the resale to customers residing in a Member State. With today's technology, we have the means to

enforce this clause. The distributor can check the IP number of the customer's computer (this number has a specific code for each country). This is not an absolute security, but one that can stop the wishful thinking of "parallel imports". However, the producer will be responsible for the control cost incurred by this clause (for example through a monthly statement of the customers' IP numbers who have ordered on the distributor's web site). The producer will also have to include a clause to guarantee the closure of the network. The distributor must agree to not satisfy orders issued by non-approved distributors or exporters. A client inventory will help the distributor identify unusual behaviour from customers, even if this type of surveillance might not be infallible.

**The fourth choice** for the producer is to allow distributors who belong to the selective network within the European Community to sell products on-line. In this hypothesis, the producer must adapt its current terms for the approval and maintenance of the agreement. From a strategic point of view, this adaptation is tricky for two reasons:

The first reason is the threat of mass retailing to "closed" networks, including in the fragrance and clothing businesses. If the producer sets approval (and continuation of the approval) terms that are too demanding for the virtual point of sale, it will cut access to on-line distribution to most current approved distributors. If the producer is flexible in its terms to adapt them to the on-line distribution, chances are mass retailing companies will have greater financial and technological resources than the network distributors. Then the producer will have to approve the virtual points of sale dependent on mass retailers or it may commit a flagrant breach of competition law (see Section 2 later).

The second reason lies in the exacerbated competition that we could imagine between the web sites approved by producer. This competition already exists between "physical" points of sale; customers are free to shop at the approved distributors of their choice. However, on-line sales may increase the risk of producers making their competitors even more competitive.

The specifications imposed by the producer on distributors wishing have their web sites approved must include the following components:

- \* The name of the site must not harm the producer's image, nor can it be incompatible with the luxury status of the brand and its products (such a clause could possibly separate web sites from mass retailers; this hypothesis still needs to be proven as regards the risk it poses under competition law).
- \* The virtual point of sale (the web site) must be exclusively reserved to the sale of perfumery items (in our case).
- \* There must be no link or hypertext to other sites, outside of those of the producer or other approved distributors.
- \* No advertisement or banner capable of damaging the producer's reputation or image of its products can appear on the distributor's web site.
- \* The web site must be updated regularly (see specifications) so that prices, new products, special offers, etc. are strictly in line with the reality and the distributor's stock.
- \* There must be an e-mail and/or customer service function so that customers can rapidly obtain answers to questions about products (see specifications).
- \* There must be one or several sales advisers with the related degree and/or expertise to answer questions (see specifications).
- \* The usual clauses regarding the point of sale prestige and the presentation of the merchandise

must be adapted to on-line distribution (layout and aesthetics of the site, colours, frames, quality of the pictures, etc.).

\* The usual clauses about inventory turnover, or turnover goals also need to be included.

It is quite possible to adapt selective distribution contracts to the specificities of on-line sales. This adaptation requires a subtle approach to find the right balance between the image objectives of the brand sought by the producer, the capabilities of information technologies, and the financial and technical means at the disposal of the distributor.

A problem remains which can destroy the economics and logic of the selective distribution networks within the EC. How can we prevent a distributor located in one Member State where prices are lower from offering on-line products, and at the same time attract customers who usually shop at distributors' located in another State?

The producer will not be able *a priori* to contractually prohibit the former from accepting an order from a consumer living in another State. Such clauses might not be in compliance with competition law. However, two economic components might play a role in favour of the producer. First, the fact that even if the good is cheaper, the potential customs duties and transportation costs could make this transaction less attractive to the customer. Secondly, if the producer can adequately manage the inventory needs of the distributor to satisfy customers, this can lead the distributor to think hard before engaging in "aggressive" behaviour towards customers residing in another Member State. By systematically accepting this type of order, the distributor is taking the risk of no longer being able to satisfy the requests of its "traditional" customer base.

This analysis implies that the producer only authorises the creation of a virtual point of sale for a distributor who belongs to the network, and who is already approved for a non-virtual point of sale; the web site becomes a mere extension of this point of sale.

#### *B) The Contractual Framework of On-Line Automobile Sales*

Automobile manufacturers seem to have grasped the fact that the Internet could potentially become a critical distribution channel for their brands in the next few years. Several converging factors are contributing to their active interest in the web not only as a communication tool, but also as a distribution tool.

\* In the United-States, 25 % of automobile buyers in 1998 had first surfed on the Net<sup>[2]</sup>

<http://www.lesechos.fr/connectis/ecommerce/ecommerce2.htm><sup>[m]</sup>

<sup>7</sup>. This proportion reached 40 % in 1999, and should reach 60 % in the year 2000. It is estimated that 5 % of automobile sales in the United-States will take place through the Internet.

\* According to a study carried out by Gemini Consulting in Europe, 42 % of potential car buyers in 2000 say that they will connect to the Internet before going to their dealer's. Experts say that by 2005, 3 % of European sales will take place entirely on the web, and that 15 % of the transactions will begin by a web connection.

Many manufacturers have taken initiatives in e-business. In September of 1999, Fiat took the decision (very popular with the press) to sell a special series - the *Barchetta Web* - exclusively on the Internet. At the same time, after having created a global "e-business" division, Ford took a minority interest in CarPoint (a subsidiary of Microsoft), the virtual multi-brand distributor of motor vehicles.

Concretely speaking, all e-business systems initiated by automobile manufacturers meet a common

model:

- \* Consumers can obtain real-time information on the Internet about the product lines offered by the manufacturer, including about the car of their choice.
- \* Consumers can define and customize the car they wish to purchase.
- \* Related services can be offered: car testing, financial plans, etc.
- \* Finally, the last phase of the process always directs the consumer towards an exclusive distribution network member:
- \* The Internet user can locate dealers by brand name.
- \* The Internet user can be put in contact with the closest dealer, including by setting up an appointment through e-mail.
- \* The Internet user is directed towards the site of such or such dealer.
- \* In the case where the sale is closed on-line, the delivery is carried out by a member of the network contacted through the Internet.

This common strategy of automobile manufacturers towards e-business contributes to reconciling many paradoxes on which the legal organisation of e-business depends:

- \* Regarding the rapid growth of the Internet, manufacturers clearly wish to use on-line sales channels to distribute their own products. On the other hand, they try to protect their traditional network of exclusive dealers who often still regard the Internet as a threat.
- \* Manufacturers are trying to entirely control the electronic business of their products, as they always have - on a more general scale - by controlling the distribution of their products (the contractual system of exclusive dealerships is proof of this).
- \* Manufacturers are trying to develop a uniform strategy for the electronic commerce of their products. But they are faced with independent resellers whose initiatives on the Internet are not *a priori* controllable, and with newcomers who exclusively use the Net (as simple "facilitators" or even "virtual" distributors).

In light of this situation, the tools available to manufacturers to legally organise their e-business strategy (mostly contractual organisation tools) are limited by an outside legal framework that is particularly constraining (competition law):

1. A manufacturer cannot prohibit its exclusive distributors from creating a commercial site for the promotion and sales of its products, unless the said site is exclusively based on an active promotional and/or sales approach (that is one that voluntarily targets out-of-area consumers). The European political context of open markets prevents any "prohibitory" action on the part of manufacturers as regards automobile distribution..
2. A manufacturer cannot contractually reserve the right to use the Internet to distribute its own products, which would be equivalent to preventing distributors from enjoying this distribution channel (previous hypothesis).
3. Finally, the specific nature of the automobile product cannot be an argument for the manufacturer to override the previous conclusions. They are imposed by the legal system that specifically applies

to automobile distribution. There is nothing that states that what would be true for the traditional distribution would no longer be true for on-line distribution. Thus, the consideration of product specificity cannot limit electronic distribution of motor vehicles beyond what is tolerated by traditional distribution.

But if an automobile manufacturer cannot reasonably object to the on-line business of its distributors, we will agree that the manufacturer can develop the legal means to "harmonise" the various initiatives of the network members under its own banner:

\* A manufacturer must be able to impose the "centralising" function of its e-business activity. This can be justified by requiring a high level of brand image maintenance, or the quality of the information and services offered to customers. For example, manufacturers can include a clause in distribution contracts that provides for their right to develop promotional and electronic sale system of their cars, including through the Internet. Dealers would then become members of this system, and commit themselves to taking part in it under the terms and conditions provided in the contract.

\* In this hypothesis, the dealer's web site must meet the standards set by the manufacturer. We can imagine that dealer sites would meet standards and technical specifications that would be in harmony with and contribute to the smooth operation of the manufacturer's own site that serves as the pivot (or heart) of a global system.

\* The necessary harmonisation of the system's technical requirements as determined by the manufacturer must provide for the possibility of including obligations related to the presentation of the dealer's site. These obligations would contribute to reinforce the image of the manufacturer's brand and quality of service. A graphical format can be designed for all of the system sites.

It is clear that such a system requires the establishment (by the manufacturer) and respect (by distributors) of some uniform qualitative criteria, constraints and standards that can be justified under competition law. This also slightly changes the foundations of the legal organisation of automobile distribution by reinforcing its *selective* rather than *exclusively exclusive* aspects.

## Section 2: The Risks of Anti-Competitive Acts in an Electronic Point of Sale Network

### A) Electronic Points of Sale for Fragrances and Competition Law

**The first hypothesis** can be summarised as follows: A producer decides to personally distribute its products on the web via its own site. It contractually prohibits its network distributors from reselling the merchandise on a site they might have created for that purpose. Such an attitude on the part of the producer seems to pose two risks that will need to be contained depending on the case. The first risk is the potential application of Article 82 of the treaty of Rome : the producer's behaviour would constitute an abuse of dominant position on the common market, or in a significant part of it, that could affect trade between Member States. This abuse would be characterised by a limitation of the openings at the expense of consumers (Art. 82-b of the Treaty of Rome). This text can only apply if we establish the domination of the market by the producer. We would also have to prove the abuse of this dominance (here, the prohibition for the distributors to resell on-line), and of course that it affects trade between the Member States (because competition based on prices cannot be used in the case of products sold on the Net, the consumer becomes the victim of the limitation of the openings on the web imposed on network distributors). The application of this text is also a possibility if the producer gets a contractual commitment from distributors under which they guarantee the inventory of the products bought on-line by consumers or the after-sale service.

The second risk in this first hypothesis would be to see the cancellation of the benefit of block exemption illustrated in Part I, Section 1. How can one justify the legitimacy of a selective distribution network based on strict criteria if the producer departs from them in order to sell its products on the Internet? However, the producer could justify this by demonstrating the specificity of the on-line sale that requires the usual resale criteria to be adapted while maintaining their distinctiveness (level of luxury, degree of expertise, health risks, etc.).

We can also mention a third type of risk which occurs when all producers (of fragrances for example) prohibit their distributors from marketing their products on the Net. Brussels could consider that there are similar restricting effects to competition, covering more than 50% of the relevant market. This would result in the inability to apply the exemption regulation (item 15 of Regulation N. 2790/1999).

**The second hypothesis** is the following: A producer only authorises on-line sale to resellers granted distribution outside the European Community with the obligation of refusing on-line orders from customers residing in the Community. In terms of risks under competition law, Article 81, para.1.b will probably be applied, although the risk is limited. The producer could in fact plead that this contractual measure (the use of technological means to prevent the on-line sale to a customer residing in a Member State) is meant to guarantee the closure of the distribution network within the Community, and that the distribution policies within and outside the Community are different.

Finally, **the third hypothesis** can be formulated as follows: A producer authorises network distributors approved for a "physical" point of sale to extend it to the web ("physical" point of sale => "virtual" point of sale). Here, the producer must show that this is not a new network parallel to its traditional network. From there, the analysis will try to determine if the possibility of reselling on the Net in the contract is prone to disturb their entrance in the framework set by Regulation N.2790/1999. Two risks must be anticipated. First, the market might become divided in two "sub-markets": distribution of the products in "physical" points of sales, and on-line distribution. This fragmentation could lead to an increase of the 30% threshold of market share for the latter, hence the loss of the exemption benefit. Secondly, the exemption benefit could be cancelled if the requirements applied to the web site (aesthetics, maintenance, etc. see Section 1) are more flexible than the ones imposed on a "physical" point of sale. The prestige and brand image argument that underlies the "selectivity" of the network, and the systematic refusal to enter the mass retailing network (Auchan, Tesco, etc.) would then be undermined.

## **B) Electronic Points of Sales for Automobiles and Competition Law**

The legal framework applicable to automobile distribution (and on a wider scale the legal framework applicable to exclusive distribution) does not allow us to consider the first two hypotheses developed for the cosmetic industry.

If we look specifically at automobile distribution, we can say that the conclusions drawn earlier would lead us to reconsider the way distribution system has been traditionally viewed under competition law.

The automobile distribution system lies on a sort of basic principle by which there is an obvious link - that must be maintained - between the sale and post-sale of vehicles. This notion has been upheld by Regulation N. 1475/95 which underlines in its 4th point that automobiles are "*consumer durables [...] which at both regular and irregular intervals require expert maintenance and repair, not always in the same place. Motor vehicle manufacturers cooperate with the selected dealers and repairers in order to provide specialized servicing for the product*". Consequently, "*the linking of servicing and distribution must be regarded as more efficient than a separation between a distribution organization for new vehicles on the one hand and a servicing organization which would also distribute spare parts on the other*".

These considerations explain the role of automobile dealership contracts drawn up by producers as a part of a marketing system suited to their products.

But the expansion of independent resellers, combined with the increasing use of the Internet as a marketing tool for new automobiles, are challenging the fundamental aspect of the automobile distribution system. It is now possible (and allowed) to purchase a new vehicle from an operator engaged exclusively in sales (without after-sale service), either directly through this operator (an independent reseller), or through an Internet site (developed by an independent reseller or an official network distributor). By breaking the sale/after-sales link, the Internet points out the demise of an automobile distribution system based on territorial exclusivity. These findings are critical at a time when the future of the automobile distribution is being played out in Brussels (the Exemption Regulation expires in 2002, and chances are that it will not be renewed).

Beyond these initial findings, we would like to develop the following idea. Even if automobile distribution cannot be exclusively exclusive, it will probably become more selective.

We have seen that the contractual system that manufacturers can use to give a legal framework to their dealers' e-business initiatives requires qualitative criteria and standards. As long as the criteria are objective, only this type of system can avoid the adverse anti-competition effects of qualitative constraints. This return of qualitative/selective factors can translate into the imposition of uniform standards applicable to the design/layout/function of distributors' business web sites.

These qualitative criteria can be part of the criteria to enter the network. They can be justified based on an analysis of Article 81, §3 of the Treaty of Rome. We can deem that cars bear the characteristics of luxury items and high-tech products:

\* First, we can say that a large number of clients buying a motor vehicle do not just look for a "box" with four wheels; the car also represents a dream rooted in the brand name and its image.

\* Secondly, the car is the most complex convenience good, which translates into need for consumers to get as much information and advice before the actual purchase.

But the approach based on selectivity can be extended to off-network distributors: there is no proof that what would be true within the network would no longer be for an off-network distributor. This statement probably applies to the criteria set for the creation and management of an independent business web site. Thus, can it not also be valid for independent distribution? Or in other words, rather than pleading for the exclusive character of their distribution system to independent distributors, why can't manufacturers not bring these parallel distributors to respect the objective qualitative criteria set as a whole? Such an approach bring about the end of an automobile distribution system based on exclusivity and replace it with one based on selectivity. The automobile would then be treated as perfume products.

If this was the case, the Internet would have contributed not only to the evolution of the distribution of some goods, but also to revolutionise the legal organisation of their networks.

## Conclusion

In our opinion, the evolution of the legal organisation of closed distribution networks should translate into a reconciliation of the two large types of networks around the notion of selectivity. In other words, the development of e-business should lead selective distribution networks to be even more selective, and exclusive distribution networks to become more expressly selective:

\* In the distribution of fragrances, cosmetics and body hygiene products, and more generally luxury

items, the action and the reaction of producers towards the development of e-business of their goods should be based on the essence of their distribution system: selectivity, linked to the peculiar nature of the goods and their brand. This selectivity should be extended to electronic points of sale (when they are admitted), and could be claimed against *free riders*. Producers will need to be more vigilant with their brands. The brand and its image are especially critical. This is probably why the recourse to trademark law is important as an instrument to protect selective distribution networks.

\* In the case of new car distribution, the very nature of the Internet collides head on with the foundations of dealership contracts, i.e. territorial exclusivity. By definition, the Internet has no frontiers and does not respect the narrow limits of the territories granted to automobile dealers. Independent resellers have already opened many breaches in automobile distribution networks. Independent initiatives in the area of e-business should increase this pattern. Qualitative selection could become an efficient course of action for manufacturers. When applied to web sites marketing new cars, qualitative selection could be used for the entire distribution system.

Finally, there is an essential player at the heart of these distribution systems: **the consumer**. The consumer must be at the centre of the strategic and legal decision making process regarding the distribution of goods, particularly when it comes to considering their electronic business.

[1] See C. Collard et C. Roquilly, *Droit de la concurrence et droit de la consommation*, in *Droit de l'Entreprise*, éditions Lamy, 2000, Paris, p.587. Also, L. Amiel Cosme, *Les réseaux de distribution*, Bibliothèque de droit privé, tome 256, LGDJ, 1995

[2] On the notion of frontiers and cyberspace, see D. R. Johnson and D. G. Post, *Law and Borders : The Rise of Law in Cyberspace*, *Stanford Law Review*, 1996, 1367

[3] See C. Manara, *Web et distribution sélective : réseau contre réseau*, *Dalloz Cahier droit des affaires*, 1999, n°44, p.726

[4] For an example of distribution framework in Ireland, see The Competition Authority Decision of February 22, 1999 relating to a proceeding under Section 4 of the Competition Act, 1991, Notification N° CA/24/95 - Cahill May Roberts Ltd / Guerlain Ltd, Decision N°538

[5] For more information, see C. Roquilly, *Le droit des produits cosmétiques*, collec. *Droit privé, Economica*, 1991, p.113 and s. C. Roquilly, *Le droit au service d'une stratégie d'entreprise : le cas des réseaux de distribution sélective*, *Droit et Patrimoine*, 1997, n°55, p.35 et s.

[6] See M. Analory and A. Casalonga, *La distribution sélective en droit communautaire*, *revue des Affaires Européennes*, 1991, n°3, p.45 and s. C. Roquilly, préc. See also *Summary of fine fragrances: a report on the supply in the UK for retail sale of fine fragrances*,

[7] EC communication from Dec. 16, 1991, Yves St-Laurent Parfums, JOCE n°L12, Jan. 18, 1992. This decision has been confirmed by the CFIEC, Dec. 12, 1996, T-19-92

[8] Obligation of competitive brands on the point of sale, participation in the introduction of new products, minimum annual purchase, sufficiently expanded and varied assortment, inventory turnover...

[9] Resale minimum price clause, exclusive purchase clause, prohibition clause for crossed deliveries within the EC and between network members

[10] JOCE, L 336/21, 29.12.1999.

[11] The first litigation in France (for cosmetic products made by Pierre Fabre Company) has just led to a priority order overruled by a judgment from the Versailles Court of Appeal (see Pontoise Market Court, April 15, 1999, *Sté Pierre Fabre Dermo Cosmétiques versus A. Breckler*, Dalloz Affaires, 1999, n°44, p.725, note C. Manara ; CA Versailles, Dec. 2, 1999, unpublished)

[12] See C. Collard and C. Roquilly, *op. cit.*, p.655

[13] For a dissenting opinion, see A. Bensoussan, « *Le commerce électronique. Aspects juridiques* », Hermès, Paris, 1998, n°2.1.2

[14] See Yves St-Laurent Parfums decision, *préc.* The French judges ruled the same way (CA Paris, Sept. 15, 1993, *Gaz. Pal.* 1993, N.6, p.45)

[15] See CA Versailles, Feb. 23, 1995, *RJDA* 1995, 6, N.706

[16] For a similar opinion, see Y. Dietrich and A. Menais, « *La distribution sélective à l'épreuve du commerce électronique* », *Cahiers Lamy Droit de l'informatique et des réseaux*, May 1999, N.114

[17] See for example the case between Christian Dior and LCD Company Ltd and Shaneel Entreprise Ltd, CA Aix-en-Provence, June 5, 1999, unpublished decision.

[18] For example, a bottle of perfume from Balmain made in France is sold for \$4 US in the USA and £9 in the United Kingdom. See Committee on Trade and Industry, Eighth Report, [www.parliament.the-stationery-office.co.uk/pa/cm199899/cmselect/cmt.../38009.ht](http://www.parliament.the-stationery-office.co.uk/pa/cm199899/cmselect/cmt.../38009.ht)

[19] ECCJ, July 16, 1998, *Silhouette International Scmhied GmbH & Co. KG versus Hartlauer mbH*, Aff. C-355/96, Dalloz Affaires, 1998, n°133, p.1592. Also, C. Montalcino, « *Importations parallèles : coexistence du droit de la concurrence et du droit des marques* », Dalloz Affaires, 1999, n°178, p.1479

[20] See Cass. Com., April 9, 1996, Dalloz Affaires, 1996, n°22, p.681.

[21] *Case C-309/94 [1996] ECR I-677* and *Case C-226/94 (1996) ECR I-651*

[22] See House of Commons - Trade and Industry - 8<sup>th</sup> report, Part III, Parallel and grey trading in the UK : "*From the evidence we have received, car and motorbike manufacturers are both supplying the grey market and decrying trading, presumably at the prompting of their official dealer network*".

[23] On the fascinating issue of the exchange of agreement and e-business, see C. Gagnon, « *L'Echange de consentement et le commerce électronique - de l'autonomie de la volonté à la volonté de la machine* », 1998, [L. Thoumyre, « *L'Echange des consentements dans le commerce électronique* », *Revue Lex-Electronica*, volume 5 N. 1, [

[24] ECCJ, February 23, 1999, *BMW versus Ronald Karel Deenik*, Case N. C-63/97.

[25] In the motorbike industry, Honda UK instigated ( November , 1998) legal action against four unofficial UK dealers selling parallel Honda products (sourced from outside the EC). Honda claimed that these dealers were infringing upon trademark laws. In the spring of 1999, Honda UK and the parallel importers settled the case out of the Court: the parallel importers agreed not to sell any Honda products that had been supplied from outside the EC, and Honda UK purchased all the parallel Honda stock that the dealers held. The parallel importers maintain that they will be able to source sufficient motorcycles in the EC.

[26] The Levi's company has decided to stop the on-line sale of its products. The company deemed that it was not its field, and wondered if this sale could not be undertaken by its distributors. On the other hand, Sony, the firm has recently announced that it was going to set up the on-line sale of its products, which generated hostile reactions from its distributors in Japan.

[27] According to a study carried out by the consulting firm JD Power mentioned by X. Debontride, « *Auto.com : quand l'automobile se lance sur les autoroutes de l'information* », [