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Considerations on exclusivity clauses

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Abstract. In the context of internet sales can we still speak about a traditional exclusivity clause inserted in commercial contracts? As a market development, we can see that even without the COVID 19 pandemic, Internet sales were boosted all over the world. With international actors such as Amazon, JD.com Inc., E-bay or Apple as well as many others, we have seen ecommerce sale rise up to 3.46 trillion US dollars in 2019 alone. Even if these sales only amount to 16.4% of global sales, according to digital commerce specialists, the numbers will be much higher during and post pandemic. This being said, is there any place left for traditional exclusivity clauses inserted in many commercial contracts such as franchise, distribution or agency contracts? What will happen with specific clauses that grant one of the parties the right to an exclusive use of a territory or the right to address a certain population? During the years, doctrine as well as jurisprudence has shown that exclusivity clauses must be drafted with balance; the risk is huge in the sense that it might restrict the free access to the market, offer clients products that are of lesser quality or lead to a stranglehold of the market. On the other hand, the use of contracts that contain exclusivity clauses might become irrelevant for the beneficiary as they will no longer offer the protection and specific interest. The study aims to analyse exclusivity clauses as defined in the national and international regulations as well as study the current framework and the jurisprudence's position on exclusivity clauses, especially the ones related to e-commerce.

Keywords. Exclusivity clause, e-commerce, vertical agreements, EU law, international commercial law.

1. Introduction

Electronic commerce, known as E-Commerce, occurs daily when sellers and buyers use the internet to conduct business transactions. Technology makes it possible for anyone to buy or sell practically anything online.

By using E-Commerce, consumers can buy the various products and services from the different manufacturers, industries can purchase raw materials, components etc. using e-commerce and sellers can sell their products.

According to various articles over the last few years, online shopping has become an indispensable part of the global retail framework. Like all industries, the retail landscape has suffer a substantial transformation following the advent and spectacular evolution of the internet, and thanks to the ongoing digitalization of modern life, consumers from virtually every country now profit from the perks of online transactions and the main reasons why consumers prefer online shopping are: the ability to shop 24/7, the ability to compare prices, online sales/better prices, to save time, greater variety, to locate hard to find items and for products which are not sold in their own country.

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As internet access and adoption are rapidly increasing around the globe, the number of digital buyers worldwide keeps increasing every year. In 2019, an estimated 1.92 billion people purchased goods or services online. During the same year, e-retail sales surpassed 3.5 trillion U.S. dollars worldwide, and according to the latest calculations, e-commerce growth will accelerate even further in the near future. In 2020 the coronavirus pandemic has put e-commerce at the forefront of retail and online shopping has gained immense traction and transformed drastically.

What is important to note is that e-commerce touches every area of retail: from foodstuff to electronic devices, to services such as theatrical plays or medical consultations, to even intermediate services such as delivering groceries or renting rides or hotel rooms, e-commerce is a more and more exploited area. Currently we can say with ease that e-commerce touches almost all of our necessities, and is developing in all parts of the world.

When combining internet sales contracts with exclusivity clauses in drafted in traditional contracts such as distribution agreements, franchise agreements, or agency agreements (that involve in common law mandate, intermediation, commission and agency contracts), what is the say of the traditional approach of contract law? Is the traditional or scholastic approach to drafting contracts so applicable in this time? Can we still speak about an exclusivity clause that can be inserted, should be inserted, in order to protect the interests of the party that needs to carry on the sale under the guardianship of the person granting the right of use and distribution of the product?

In the study, in the first phase we aim to analyse the definition of the exclusivity clause as it is given in the Romanian regulation. In a second phase we shall look upon the European regulation as well as the position of the European Court of Justice on agreements that exclude or limit sales over the internet as a result of a direct or indirect exclusivity clause.

2. The exclusivity clause in the Romanian regulation

Generally, an exclusivity clause is defined as a contractual clause inserted in any type of agreement, such as a distribution, franchise or agency contract, that will limit the right of the principal, as well as of the beneficiary of the contract to distribute or sell the same product or service in a determined geographical area or to a specific category of clients.

Within the Romanian regulation we do not have a specific definition of the exclusivity clause. It is however used under the agency contract regulation in article 2074 of the civil Code that establishes that: “The agent cannot negotiate or conclude on his behalf, without the consent of the principal, in territory determined by the agency contract, contracts regarding goods and services similar to those that make the object of the agency contract.”[1] Doctrine has established that the exclusivity clause is the contractual clause that restraints the right of the agent and the right of the principle to negotiate or conclude contracts regarding goods and services similar to those that make the object of the agency contract, in the geographical region determined by the contract, for other principles, respectively the right of the principle to conclude contracts with more agents in the same region and for the same type of contract. [2]

The exclusivity clause can be found in other specific commercial contracts such as franchise agreements or distribution contract. In a more general manner, doctrine has pointed out that the exclusivity clause is a complex agreement, that imposes to the party granting exclusivity obligation to not undergo the commercial activity that makes the object of the contract in a determined geographical area. [3]

Doctrine has largely classified the extent and types of exclusivity clauses, but some of them are not applicable even to in-store retail. As to the extent of exclusivity clauses, they may concern not only first-hand retail, but also the possibility to resell or re-distribute any services or products that fall under the general agreement in which the exclusively clause is provided.

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[4] We must mention that a closed or an absolute exclusivity clause can be annulled under general anti-trust regulations as they imply the interdiction to re-export in other territories or to forbid to their resellers to reexport in another territory. As pertaining to the types of exclusivity clauses we have to cite the exclusivity of contract, the exclusivity of contract and supply and the exclusivity of brand. [5] While the first only refers to the interdiction of concluding the same contract within the same territory, the second adds the obligation to not distribute the same products in the exclusivity territory, while the latter also implies the introduction to use the same brand in the exclusivity territory. As we can see in this case also, we have a lot of room for anti-trust laws to come into effect.

But in our opinion, what mainly influences e-commerce sales are not the traditional classifications of exclusivity clauses, but rather the demarcation between active and passive sales, made throughout international regulations, mainly at EU level aiming to interpretate and determine the applicability of article 101 of the Treaty of the Functioning of the European Union (herein after TFEU). As a Member State of the EU, Romania needs to apply the international European regulations as well as comply with the general guidelines and interpretations offered by the European Court of Justice. In this context, it must be mentioned that active sale refers to actively approaching individual consumers either by mail (including unsolicited e-mail) or visits or actively approaching a specific customer group or customers in a specific territory through advertisement in media, targeted internet ads or promotions. Passive sales on the other hand, refer to responding to unsolicited requests from individual customers including delivery of goods or services to such customers. General advertising or promotions that reach customers in territories that are under an exclusivity clause, but are targeting customers in the territory of the seller fall under passive sale, if it is established that these sales would remain attractive to the buyer if they wouldn't reach customers outside of the seller's territory. [6] This specific classification best applies to e-commerce contracts and allows both principal and contractor to determine what kind of sales will fall under the regulation of the exclusivity clause.

We must note that the Romanian national regulation currently has no mention or classification of exclusivity clause. In this respect, it makes no difference in between sales that conducted over the internet or sales that are conducted through a physical sale point. However, as mentioned above, both institutions and private actors are bound by European regulations and doctrine.

Furthermore, from the phrasing of the Romanian regulation, we note that generally the exclusivity clause in the agency contract generally works within the favour of the principal. However, nothing forbids the parties from inserting an exclusivity clause also in the favour of the agent. This applies to all commercial contracts under which obligations may be subjected to an exclusivity clause. We join in the opinion that the exclusivity clause is not a standard clause within Romanian commercial contracts, and as such it should be approved by a written agreement by the party which obliges. [7] Additionally, we consider that this clause may only be applicable if the graphical area, the clients it concerns as well as the goods and services rendered and the contract which contains this clause, are very well established, and do not limit *per se* the possibility of the commercial agent to undergo his activity.

3. European approach to exclusivity clauses

Under the Draft Common Frame of Reference (DCFR) which is the soft law approach of a unified private law, the exclusivity clause is regulated and the provision IV, E-5:101 paragraphs 2-4, within the section of the distribution contract.[8] As we can see the European legislation, be it only as a reference, is much clear than the Romanian legislation as pertaining to the extent and the obligations of the parties within an exclusivity clause. Furthermore, the European

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legislation clearly states that an exclusivity clause can also be stipulated in favour of the distributor.

Nonetheless, European legislation on the matter is clearly based on article 101(1) of the TFEU, which prohibits agreements that have as their objective or effect the restriction or prevention of competition. Article 101(3) allows for exemption of agreements or restraints that contribute to efficient production or distribution, providing that: consumers are given a fair share of the resulting benefit, the restraints imposed are indispensable to the achievement of efficiencies, and the restraints do not involve the elimination of competition for a substantial part of the product in question.[9] Furthermore, Regulation 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, also referred to as "Block Exemption", provides exceptions to the application of article 101(3), that allow vertical restraints. These exemptions can only apply to buyers or sellers in vertical agreements that hold less than an established share of their respective markets, meaning less than 30%. [10] Within the same report, the Commission regards as a restriction any obligation that forbids or dissuades the parties from using e-commerce.

But how does this all work out for sales over the internet? The European Court of Justice has on numerous occasions asserted that e-commerce cannot be limited in any case under the provisions of Article 101(3) nor under the restrictions of the Block Exemption. In the Pierre Fabre case (PFDC) [11] neither the protection of customers against incorrect use of products nor the manufacturer's intention to maintain the prestigious image where legitimate aims to justify a ban of Internet sales. [12] In this case the PFDC was a cosmetics company that sold its products through different pharmacy retailers; one of the clauses of the selective distribution contract stated that the sale of four brands of its products had to be made in an external space, with a qualified pharmacist present. As such, it excluded *de facto* all internet sales. The European Court ruled that the above-mentioned clause has at the very least the objective to restrict passive sales to end users located outside of the physical trading area of the relevant member of the selective distribution system; furthermore, it deemed the internet as a marketing mechanism and pointed out that by a "place of establishment" one should have understood at the time only outlets where physical direct sales take place and thus, doesn't encompass the internet sales.

However, in a more recent jurisprudence, the Court nuances its approach – when speaking about luxury goods, apparently, the criteria can't apply in the same manner as it did in the PFDC case. The Coty case [13] opposed Coty Prestige and one of its authorised retailers, Parfümerie Akzente GmbH, which sold the distributor's products partly on their own website and partly through an intermediate platform, amazon.com. Coty sought for an injunction to stop sales through third-party distributors, because as it pointed out, this endangered the image of its products. The German court the first instance considered that the said clause did not deserve a block exemption, as there were other means in order to preserve the company's image. Plus, in the national court's view, the selective distribution system, in its own, is restrictive enough to the competition.

When the case was brought in front of the European Court, it deemed that if it was necessary to preserve the luxury image of specific goods and if the selective distribution contract was put in place with clauses designed especially to the that end, then the said contract would not represent an infringement to article 101(3). The Court first re-established its jurisprudence from a previous case [14], that a selective distribution is in accordance with the provisions of the Treaty if three conditions are met: the resellers should be chosen on the basis of objective criteria, the characteristics of the goods for which the selective distribution is used require a system of this type to preserve their quality and ensure their proper use and the criteria used

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does not go beyond what is necessary and held that neither article 101(3) or article 4 of the Commission Regulation 330/2010 may be interpreted as prohibiting inside a selective distribution system the use of clauses that restrict authorised distributors from using in a discernible manner third-party platforms for the internet sale of luxury goods.

The Court established that a similar issue should be treated on a case-by-case basis, and national courts should establish if a similar contractual clause contributes to the maintenance of the brand's image or it is simply a restriction by object. The European Commission has recently taken the view that the differentiation made by the Court in the Coty judgement between luxury goods (at issue in the Coty case) on the one hand, and other products such as the cosmetic and body hygiene goods (at issue in the Pierre Fabre judgement), should in practice only be of limited relevance. A clear delineation between one and the other will in many cases neither be possible, nor necessary as high-quality and high-technology products similarly qualify for selective distribution compliance with article 101(1) TFEU. [15]

We consider, in the light of this development, that the Court has a more moderate approach to e-commerce sales as well as the insertion of clauses that restrict sales over the internet. This being said, we consider that e-commerce sales as well as distribution through third-party retailers are not always permitted; even in e-commerce sales, one needs to respect and uphold the image of the brand as well as preserve the quality of the goods. Of course, this does not automatically permit the use of exclusivity clauses, nor does it permit the division of territory or appliance. It does however set standards for distributors as well as suppliers who need to maintain the contractual agreements. In one opinion the recent jurisprudence of the Court does not adequately explain why it opted for the restriction of using in a discernible manner the use of third-party platforms for the sale of luxury goods; it underlines that the use of third-party platforms has increased over time, and retailers across the EU who either have no other way to sell their products on the internet or stand to face financial problems by having to avoid the use of discernible third-party platforms for the online sale of luxury goods will surely be in peril in the light of this caselaw. [16]

Caselaw has proved that decisions need to be taken on a case-by-case basis even before the European Court of Justice rulings. In one case that opposed the French national authorities on one side, and Apple and Orange on the other, the High Court of Cassation ruled against the Court of Appeal of Paris and stated that within a contract that contains an exclusivity clause of distribution, one must assess the facts such as the position of the companies on the market, their sales and the extent of the clause as well as the potential harm that it might to economically as well as from a competition point of view – could a potential exclusivity clause encourage other actors in the field to up their offers? [17]

4. Conclusions

In this study we have observed that the Romanian regulation is much less developed and much less aimed at protecting either parties of the contract that contains an exclusivity clause; furthermore, we found no mention of how an exclusivity clause should work if inserted in the contract that covers e-commerce sales as well as sales in a brick and mortar shop. On the other hand, the European legislation as well as the approach of the European Court of Justice clearly states that sales conducted over the internet – though some merchants might not like this liberal approach to being able to sell almost everything over the internet, and some criticize the lack of accuracy and uncertainty within the European guidelines, no one can sustain that exclusivity clauses are strictly forbidden, even when speaking about e-commerce.

Though some authors proved in separate studies that sometimes noncompetition laws affect the success of a venture backed innovation community, and support a less restrictive regime of regulation [18] as to encourage innovation and competition in different areas, others might

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argue that the use of such clauses help maintain the quality of the products and services rendered.

We argue however that in some types of contracts, such as distribution, franchise or agency agreements an exclusivity clause has a purpose of its own – it encourages the distributor to enter into such agreement, because it guarantees the existence of a market for his products as well as the reputation brand. Also, for the supplier, it ensures the possibility to enter new markets and appeal to new clients at a lower price point, with minimum investment and less risks and then an actual implementation on the said market. One might argue that in this context the exclusivity clause will only restrain the supplier from entering himself into the market via e-commerce. The logistics of such implementation are not always obvious and can also be costly. Practice has shown that there are several ways to tackle e-commerce sales and distribute market share in applying an exclusivity clause, without harming competition over the internet. As an example, franchise contracts in practice have established three ways in which the franchisor can determine the implication of franchisees in e-commerce trade, by using this clause. The first is provided for when the franchisor is the only one managing e-commerce, the second is when the franchisor implies the franchisees in internet transactions (either by sharing a part of their turnover with the franchises, or handling all internet transactions but referring clients to pick up their orders in the nearest shop, regardless if it is a franchise or a main store) or the third, allowing the franchisee to undergo activities on their own websites. [19]

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(3) A selective distribution contract is a distribution contract under which the supplier agrees to supply products, either directly or indirectly, only to distributors selected on the basis of specified criteria.
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