

Luxury Brands' Special Position in Competition Law – Especially in Articles 102 and  
101(1) TFEU

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The thesis evaluates luxury brands' special position in competition law. The two areas I focus on are excessive pricing and selective distribution, which are both prohibited under the Treaty on the Functioning of the European Union. In order to evaluate luxury brands position, the interface between brands and trademarks is evaluated. The method used is legal dogmatic as the thesis evaluates current and applicable legislation as well as case law.

Regarding luxury brands, trademarks are a relevant part of the luxury brand as these have often held equivalent. Trademark holder is not automatically held to have a dominant position although in theory the exclusive right granted may seem applicable under Article 102 TFEU. Excessive prices may be justified, as consumers are willing to pay a high price of luxury products as the high price may indicate superior quality and good reputation. Thus, a trademark may have better protection in the light of luxury branded products but trademark is still not justifying abuse of a dominant position.

ECJ's conclusion in case C-230/16 Coty Germany v Parfümerie Akzente indicates that selective distribution is treated differently in the light of luxury brands. The prestige image and aura of luxury are preserved. Thus, luxury brands have extensive protection. Similarly, ECJ's conclusion clarified legal uncertainty. However, the definition of luxury products is still left open.

Keywords: Competition, Intellectual Property, Trademark, Brand, EU Law

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**Abbreviations****ECJ**

The European Court of Justice

**EEA Agreement**

The Agreement on the European Economic Area

**EU**

The European Union

**EUIPO**

The European Union Intellectual Property Office

**IPR**

Intellectual Property Right

**LVMH**

Moët Hennessy Louis Vuitton SE

**Member States**

The Member States of the European Union

**TFEU**

The Treaty on the Functioning of the European Union

**TEU**

The Treaty on European Union

**TLT**

Trademark Law Treaty

**TRIPS**

Agreement on Trade-Related Aspects of Intellectual Property Rights

**WIPO**

The World Intellectual Property Organization

**WTO**

The World Trade Organization



## 1. Introduction

### 1.1. Introduction to the Topic and Outline

Intellectual property is the most important asset of companies almost without an exception<sup>1</sup>. Trademarks can be identified to be significant for corporations in the common market. Furthermore, trademarks are significant in the commercial scene<sup>2</sup>. For corporations, global or national, trademarks are highly valuable and therefore may formulate a significant part of companies' assets. In addition, as trademarks are valuable, brands may still have more volume and importance on companies and impact on consumers. Trademarks grant the exclusive right for the trademark holder that means the trademark holder may prohibit other operators from using the sign or mark<sup>3</sup>.

Brand may be referred to “[n]ame given to a product or service from a specific source.”<sup>4</sup> It is common that in this sense the meaning of the brand also refers to trademarks.<sup>5</sup> As brands distinguish products from the other products in the market, it is a measure for consumers to separate products from each other. Consumers may trust on the product branded, as it is a guarantee of the quality of the product.<sup>6</sup> In fact, a product with a certain brand can be considered to refer to good quality and certain price frame – it highlights the added value.<sup>7</sup> However, as commonly trademarks and brands are referring to each other, these need to distinguish from each other. As a matter of fact, a trademark may be considered as a part of a brand. This will be discussed further in this thesis.

Luxury brand conglomerates are an essential part of luxury brands. Luxury brand conglomerate refers to multi-industry company that is a combination of at least two companies, which have diverse businesses but still fall under one corporation<sup>8</sup>. Luxury

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<sup>1</sup> Innanen – Jäske 2014, p. 19.

<sup>2</sup> Pila – Torremans 2016, p. 363.

<sup>3</sup> Salmi – Häkkänen – Oesch – Tommila 2008, p. 105.

<sup>4</sup> Jerry McLaughlin, ‘What is a Brand, Anyway?’ *Forbes* (21 December 2011) available at <[www.forbes.com/sites/jerrymclaughlin/2011/12/21/what-is-a-brand-anyway/](http://www.forbes.com/sites/jerrymclaughlin/2011/12/21/what-is-a-brand-anyway/)> (accessed 29 October 2018).

<sup>5</sup> Ibid.

<sup>6</sup> Innanen – Jäske 2014, p. 25.

<sup>7</sup> Ibid.

<sup>8</sup> ‘Luxury Conglomerates’ *Revealing your deep fashion thoughts* (24 November 2016) available at <[fashionthoughtsweb.wordpress.com/2016/11/24/luxury-conglomerates/](http://fashionthoughtsweb.wordpress.com/2016/11/24/luxury-conglomerates/)> (accessed 20 October 2018).

brands, and thus luxury products, have global power in the markets. Deloitte<sup>9</sup> did research<sup>10</sup> in February 2017 in which it found that average luxury goods sales of top 100 companies were \$2,1 billion.<sup>11</sup> Luxury brand conglomerates possess a relevant market share in fashion industries. Moët Hennessy Louis Vuitton SE (LVMH) is considered the largest one<sup>12</sup>. As LVMH has a relevant market share on luxury brands, it is relevant to raise some concerns – especially in the light of competition.

Whereas trademarks grant the exclusive right for the trademark holder, competition law aims to consumer welfare and free competition. Free competition is seen as a way to boost consumer welfare. Competition law prohibits under Article 102 TFEU abuse of a dominant position. Abusive behaviour comprises various actions – excessive pricing seems to be the most relevant in the light of trademarks. Excessive pricing refers to a situation where prices are either too low or high.<sup>13</sup> In the case of trademarks, especially luxury trademarks, high prices seem to fit in this provision. Thus, this needs to evaluate further, whether luxury trademarks falls within the scope of Article 102 TFEU.

In general, the question is how broadly producer or manufacturer may have a dominant position or monopolise in the markets by registering trademarks<sup>14</sup>. Businesses that invest in registering trademarks have a greater interest in registering different elements and signs of which are used in marketing in which the target group is consumers. This has led to situations where even more signs and elements are pursued to register.<sup>15</sup> Eventually, the situation described previously, produces new challenges in the field of trademark law. Development in this field rises questions towards competitors – how broadly may producers or manufacturers register their signs?<sup>16</sup> Considering a brand as a trademark highlights that even more often the owner of the trademark have a broad right to veto.<sup>17</sup> In the end, broad registrations and interpretations may cause contradictions with

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<sup>9</sup> Deloitte Touché Tohmatsu Limited is a global company providing audit, consulting, financial, risk management and tax services.

<sup>10</sup> Deloitte Touché Tohmatsu Limited, ‘Global Powers of Luxury Goods 2017: The new luxury consumer’ available at <[www2.deloitte.com/content/dam/Deloitte/global/Documents/consumer-industrial-products/gx-cip-global-powers-luxury-2017.pdf](http://www2.deloitte.com/content/dam/Deloitte/global/Documents/consumer-industrial-products/gx-cip-global-powers-luxury-2017.pdf)> (accessed 25 August 2018).

<sup>11</sup> Ibid, p. 3.

<sup>12</sup> Ibid, p. 22.

<sup>13</sup> Wikberg 2011, p. 301.

<sup>14</sup> Palm 2004, p. 295.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid, p. 296.

<sup>17</sup> Ibid.

competition law. Trademark holders must leave some market for competitors, in other words, they are not allowed to close the whole market area of the trademark registered.

In addition, Article 101(1) TFEU prohibits agreements that restrict competition. The provision covers such agreements that are restrictive both on horizontal and on vertical level. In this thesis, I will focus on vertical restraints, in other words, vertical agreements that might restrict competition. The focus is especially in selective distribution as selective distribution systems are highly common in the field of branded products<sup>18</sup>. In order to selective distribution agreement to not fall within the scope of Article 101(1) TFEU, three cumulative criteria need to fulfil.

The vital part of the analysis on selective distribution system in the light of luxury products lays down on ECJ's recent case law. ECJ concluded in case *Coty Germany v Parfümerie Akzente*<sup>19</sup> that selective distribution system was justified under circumstances where Coty, the manufacturer, imposed certain criteria on the distributors. The criteria imposed by Coty were held restrictive in previous case law, but the conclusion of case *Coty Germany v Parfümerie Akzente* improved the protection of luxury brands. The case was long awaited as in previous circumstances legal uncertainty existed. Due to this conclusion, it is evident that luxury brands have a special position regarding selective distribution. Thus, extensive analysis and evaluation are necessary, especially in the light of luxury brands, as the case raised discussions in general.

My scope will be limited on trademarks and competition, especially in luxury brands. As further is described more detailed, brands and trademarks are close to each other when examining those in the economic perspective. However, legally, brands and trademarks differ from each other. This section will be clarified later on this thesis. My focus will be on abuse of a dominant position, especially excessive pricing, and on the selective distribution that both are prohibited under TFEU<sup>20</sup>. Even though, selective distribution may be exempted under Article 101(3), this section has been left out from the evaluation. Thus, the applicability of Article 101(3) is out of this thesis' scope.

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<sup>18</sup> Which – Bailey 2015, p. 680.

<sup>19</sup> Case C-230/16 *Coty Germany v Parfümerie Akzente*.

<sup>20</sup> Referring to Articles 101 and 102 TFEU.

Extensive research in this field is necessary, due to the fact trademarks and competition law have in principle conflicted with each other. As the registered trademark gives an exclusive right for the owner for the mark registered, it has been argued that this exclusive right will inherently conflict with competition<sup>21</sup>. The other perspective for this is that the exclusive right is “essential to enable undistorted competition in factors such as innovation and *quality*”<sup>22</sup>. Much research has not been done specialised in contradictions between trademarks, especially luxury trademarks, and competition. Instead, other intellectual property rights and competition have been examined much more. Current legislation in the European Union arouses significant discussions as it seems to have fundamental contradictions in theory. As both, international treaties and legislation protect intellectual property rights and competition and legislation, conflicts in these can be identified. In somehow, trademarks and brands are set in a different position, or as it could be argued in a special position, by allowing actions that can be held in contrary to the current legislation.

## 1.2. Research Questions and Methods

The research questions are formed from this background. As previously described the relevant background, the research questions are the following:

- a) Whether trademark is allowing abuse of a dominant position in the case of luxury brands? If not, why?
- b) Whether selective distribution is treated differently in luxury brands?

In this thesis, I will use the legal dogmatic method. The method is relevant for this field because I will examine current and valid law within the European Union, including, legislation, international treaties and case law as well as literature. The legal dogmatic method is considered to be an examination of norms and regulations but precisely on those that are parts of the current and valid legal system. Legal dogmatic method outlines, systemises its object, in other words, the current and valid legal system.<sup>23</sup> Traditionally, two sides are separated in legal research that forms the central area of this method: a) legal concepts’ construction and legal regulations’ systematisation by means of these

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<sup>21</sup> Turner 2010, p. 3.

<sup>22</sup> Ibid. Emphasis added.

<sup>23</sup> Aarnio 1989, p. 48.

concepts, and b) legal regulations' content detection (interpretation) and their abstract application.<sup>24</sup> As a conclusion, legal dogmatic method is characterised to be one branch of jurisprudence, and its target is to *interpret* legal norms and *systemise* those.<sup>25</sup> This method is reasonable in this thesis as it reveals how current legislation has blind spots and disclose how the current regulation is fragile. In order to reveal the fragile nature, legal dogmatic method applies perfectly for this purpose. As I am examining current and valid legislation, a legal dogmatic method is a natural method to use.

### **1.3. Structure**

The structure of this thesis will move from the abstract to the concrete. At first, I will present how trademarks are formed over the ages and how it is nowadays regulated within the European Union. After that, I move to luxury brands. This section will bring trademark and brand together. I examine the differences between trademark and brand and how these are united. This section also introduces luxury brand conglomerates. The fourth chapter concerns competition law within the European Union and how those might conflict with trademarks and brands. The fifth chapter covers the evaluation of the contradictions between competition law and trademarks and brands. This chapter analyses the research questions. The last chapter is left for the conclusions and further research suggestions on the matter.

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<sup>24</sup> Aarnio 1978, p. 52.

<sup>25</sup> Aarnio 1989, p. 48. Emphasis added.

## 2. Trademarks and the European Union

### 2.1. Trademarks

#### 2.1.1. Definition

Nowadays, the trademark industry is an essential element of the commercial scene.<sup>26</sup> Trademark is a basic element in the modern market economy and competition between the companies.<sup>27</sup> The economic target is to direct consumer's sales desire to mark owner's products and services. Thus, trademarks have formed an irreplaceable tool for producing goods and distribution of goods for mass consumption.<sup>28</sup> Trademarks, in general, are for consumers a way to recognise products and services. This is for the companies a way to connect their products and services for a specified mark. Trademark may consist of various factors. In the European Union, the trademark is currently defined as follows:

A trade mark may consist of any signs, in particular words, including personal names, or designs, letters, numerals, colours, the shape of goods or of the packaging of goods, or sounds, provided that such signs are capable of:

(a) distinguishing the goods or services of one undertaking from those of other undertakings; and

(b) being represented on the register in a manner which enables the competent authorities and the public to determine the clear and precise subject matter of the protection afforded to its proprietor.<sup>29</sup>

As we can note, a trademark may consist of various factors, and for consumers, it is not always clear what the trademark exactly is. Probably, the most common one is to identify a name as a trademark, for example, Louis Vuitton. Trademark is a way to mark products to distinguish these from other products in the market. If there were no trademarks, differences of the products would be obscure for consumers<sup>30</sup>. On the other hand, due to trademarks, companies have incentives to produce high-qualified products because they

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<sup>26</sup> Pila – Torremans 2016, p. 363.

<sup>27</sup> Salmi – Häkkänen – Oesch – Tommila 2008, p. 43.

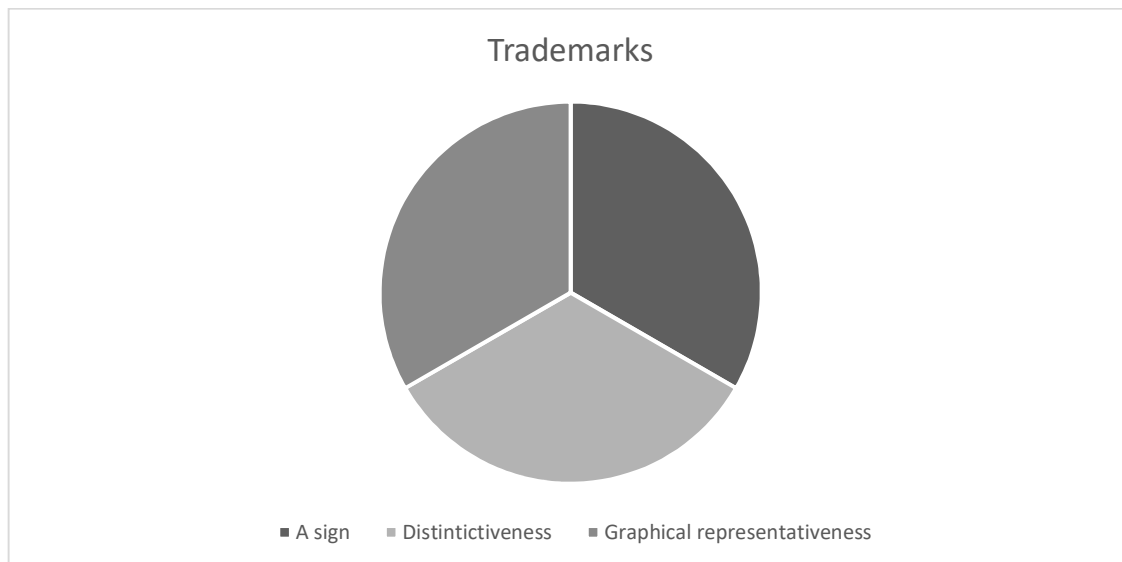
<sup>28</sup> Ibid, p. 45.

<sup>29</sup> Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade mark, Article 3.

<sup>30</sup> Salmi – Häkkänen – Oesch – Tommila 2008, p. 43.

are recognised in the markets, and thus it is necessary to give a trademark to the products made.<sup>31</sup>

The trademark's content, defined above, sets minimum requirements what a trademark must consist. There are three requirements to fulfil. First, there needs to be a sign; second, that sign needs to be capable of being represented graphically; and third, the sign needs to be distinctive.<sup>32</sup>



*Figure 1.* Requirements for registration of a trademark. Trademark in question must meet all three criteria.<sup>33</sup>

In principle, like other intellectual property rights, trademarks are territorial.<sup>34</sup> Territoriality means that the rights are generally tied to a particular country or another limited area because their existence is dependent on statutory or another type of legal protection, which is gained under the legislation of the specific country. However, territoriality is problematic because the market area of the products is not usually limited to only one country. This means that the same rights need protection in various countries.<sup>35</sup>

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<sup>31</sup> Ibid.

<sup>32</sup> Pila – Torremans 2016, p. 367.

<sup>33</sup> Ibid.

<sup>34</sup> Dinwoodie 2017, p. 1673.

<sup>35</sup> Salmi – Häkkänen – Oesch – Tommila 2008, p. 66.

The problem has been noticed, and different organisations have reached a solution on that. In order to register trademarks internationally, three conventions have been created: Madrid Agreement<sup>36</sup>, Madrid Protocol<sup>37</sup> and Trademark Law Treaty (TLT)<sup>38</sup>. Madrid Agreement and Madrid Protocol together created Madrid System.<sup>39</sup> Regulation on Community trademark created a completely new system regarding international trademark system, which has been enforced in the EU area from 1996.

Trademarks are registrable. As from the territorial nature of trademarks, trademarks are registered for a certain area. For example, a trademark registered in Finland, gives protection only in Finland. If protection is wanted to have broadly, in other words, in several countries, trademarks must register separately in each country. Trademarks can be registered in country-specific registration procedure, as a Community Trade Mark. The administrative authority in Community Trade Marks is European Union Intellectual Property Office (EUIPO)<sup>40</sup>. One option for international trademark registration is to register the trademark in accordance with Madrid Protocol. The administrative authority in this international procedure is WIPO.<sup>41</sup>

In practice, there are three ways to register a trademark:

1. national registration at the national authority's office, for example, in Finland this authority is the Finnish Patent and Registration Office;
2. international registration according to Madrid Protocol/Madrid Agreement at WIPO; and/or
3. Community Trademark registration at EUIPO in which the territory is European Union and thus may be called as European Union trademark.<sup>42</sup>

Goodwill is often discussed in relation to trademarks.<sup>43</sup> When the trademark has been long in markets, or it has otherwise become well-known on its target group, trademark

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<sup>36</sup> Madrid Agreement Concerning the International Registration of Marks concluded in 1891.

<sup>37</sup> Concluded in 1989.

<sup>38</sup> Concluded in 1994. TLT standardises and streamlines national and regional trademark registration procedures.

<sup>39</sup> This system makes it possible to protect marks in various countries. It gives effect in each contracting party.

<sup>40</sup> EUIPO was previously known as OHIM (Office for Harmonization in the Internal Market).

<sup>41</sup> Innanen – Jäske 2014, p. 69.

<sup>42</sup> Ibid.

<sup>43</sup> Pretnar 2004, p. 507.



develops goodwill. Trademark's goodwill generally means its good reputation, recognition or fame. Goodwill is the addition, which has been established due to its consumption and market measures. The more well-known mark is the bigger the goodwill is. Trademark law aims to protect that goodwill the producers and their products have gained because of sales and marketing. By taking care of the trademark, the goodwill is protected. Consumers utilise products' origin and its probable quality when making purchasing decisions.<sup>44</sup> However, worth to mention is that trademark's goodwill may suffer direct infringements the same way as trademarks itself.<sup>45</sup> In addition, goodwill is valuable for companies. Goodwill's value is, for example in acquisitions, one of the most relevant matters to take into consideration. The value may be a large part of the final purchase price.<sup>46</sup>

### 2.1.2. Trademarks' Functions

Trademarks have various purposes and functions. One of the central functions is distinctiveness. The trademark holder aims to distinguish its products and services other corresponding products and services.<sup>47</sup> As already previously stated, trademarks describe for the customer of what products is in question. Using a specific mark is an easy way to distinguish different products in the markets. Another central function of trademarks is the originality. Trademark tells where the product comes from. Originality assists the consumer to compare products between each other. Originality may tell, for example, the designer of the product, geographical origin or economic origin. Both originality and distinctiveness are maintained to be the most significant functions of trademarks. However, nowadays, originality does not fulfil necessarily as brands are concentrated on certain owners.<sup>48</sup> As hereafter will be presented, many luxury brands are concentrated on the same owner, and can be called as luxury brand conglomerates.

Trademarks' guarantee function means that the trademark pledges the quality of the product.<sup>49</sup> The consumer may trust that the same products cover the same quality. Products and services are aimed to be positioned in accordance with their quality. Thus,

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<sup>44</sup> Salmi – Häkkänen – Oesch – Tommila 2008, p. 59.

<sup>45</sup> Pretnar 2004, p. 512.

<sup>46</sup> Salmi – Häkkänen – Oesch – Tommila 2008, p. 59.

<sup>47</sup> Cohen Jehoram – van Nispen – Huydecoper 2010, p. 5.

<sup>48</sup> Innanen – Jäske 2014, p. 64.

<sup>49</sup> Case C-487/07 L'Oréal & Others v Bellure & Others, paragraph 58.

trademarks also tell the consumer whether the product or the service is average or luxury. However, for example, licensing may decrease the quality. Some products may have been better quality before than it is now because when a trademark is licensed, the owner has no obligation on supervising the quality standards. Generally, for the trademark owner, it is more beneficial to keep the quality standards uniformed and so to increase the consumers trust on products and brands.<sup>50</sup> It is argued that the reputation of the trademark is connected to the goodwill.<sup>51</sup>

Advertisement and communication functions are important as well. This is a way to unite advertising and product advertised.<sup>52</sup> A positive image is aimed to create. In practice, trademark unites brands' creation of an image for products. Trademarks' competitive function means the benefit that a product with a trademark has with respect to competitors. The competitive function is a combination of functions presented above. The more well-known the trademark becomes the bigger competitive function is formed. This is protected by providing wider protection on trademarks with a reputation. The economic function of trademarks is closely related to competitive function. Strong trademark forms a base for building a brand and is valuable for the owner.<sup>53</sup> Comparison between the school of Harvard and school of Chicago expresses the economic function of trademarks.

If we consider trademark in the light of school of Harvard and school of Chicago, we may see the basic conflict with competition law with the trademark. School of Harvard considers trademarks as a negative monopoly. The protection of the trademark adds the costs and barriers to entering the markets. Markets and images of the product create factitious differences between the products, and it is referred to be a waste of resources. In addition, the school of Harvard considers the protection of trademark lead into higher prices. School of Harvard considers keeping protection of trademark as narrow as possible; in order to consumers have a various advantageous selection of products.<sup>54</sup>

Instead, the school of Chicago considers trademarks to be a positive monopoly. A trademark helps the consumer to find promptly the product wanted and gave information on the quality of both products and services. Trademark protects from competition

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<sup>50</sup> Innanen – Jäske 2014, p. 65.

<sup>51</sup> Cohen Jehoram – van Nispen – Huydecoper 2010, p. 15.

<sup>52</sup> Ibid, p. 13.

<sup>53</sup> Innanen – Jäske 2014, pp. 65–66.

<sup>54</sup> Palm 2002, pp. 40–41.

benefit, which the trademark holder has gained. The differentiation between products is made with imaginary marketing and products are sold in the light of the trademark itself. The quality may not always be the reason for purchase, images sell. Trademarks should be protected against free riding and dilution.<sup>55</sup>

### **2.1.3. The Rise of Trademarks**

Marking trademarks have been rehearsed ever since prehistoric times. Already then, when people either produced goods by themselves or acquired wares from local artisans, there were traders that marketed their products ever for on long distance. For example, 5000 years before Christ, carvings were made on Greek earthenware. In addition, over 3000 years ago, Indian artisans carved their name in artistic creations before sending those to Iran.<sup>56</sup> Marking spread from the iron industry to among artisans. The traders and artisans had an obligation to mark their products. The purpose was to distinguish the products made by the traders and outsiders, and hence, to support the traders. In addition, this protected consumers as well. This can be called as a medieval consumer protection system.<sup>57</sup> However, the obligation moved gradually towards mark right.<sup>58</sup>

Trademark rights in their current meaning were formed after the mid-1800s along with the industrialisation. Manufacturers began to demand legislation, which would protect their marks against counterfeits. Rules regarding registering trademarks were formed, and the transition on mark's right began. After that, using marks were optional, and the target was to serve the holder of the mark. In order to fulfil its mission, marks must stay distinct from the other products in the markets. Originally, trademarks originated protection from their use from the law or case law. It was dependent on whether the mark holder wanted to protect the mark by taking legal actions against abuses. As soon as industrialisation and society varied, the concentrated system was noted to need.<sup>59</sup>

Around the Europe, protection on trademarks formed approximately at the same time. In France, registering trademarks was made possible with the law of 1857. The first trademark law in Italy was enforced in 1868. The first trademark office was built up in

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<sup>55</sup> Ibid, p. 41.

<sup>56</sup> Salmi – Häkkänen – Oesch – Tommila 2008, p. 69.

<sup>57</sup> Ibid, pp. 70–71.

<sup>58</sup> Huttunen 2002, p. 6.

<sup>59</sup> Salmi – Häkkänen – Oesch – Tommila 2008, p. 71.

England with law formed in 1875, and the world's first office was opened in London in 1876. German law regarding trademarks (1874) based on the thought that the right for a trademark is based on rather registering than the use. The Nordic countries followed mainly the German example.<sup>60</sup>

At the end of 1800s and in the beginning of 1900s, trademarks were normally the names of the producers. Later, trademarks were used to identify certain kinds of products or their quality. Various trademarks are still used even though they were created ages ago, such as Singer (1851), Coca-Cola (1886) and Kodak (1888).<sup>61</sup>

#### **2.1.4. Regulatory Base for Protection of Trademarks within the EU**

Treaty on the Functioning of the European Union, hereafter TFEU, is alongside with Treaty on European Union, hereafter TEU, the main agreement on imposing legislation on European Union. These two treaties are the backbone for the European Union. Treaties have the same legal status<sup>62</sup>. These agreements were a part of the Treaty of Lisbon, which was signed in December 2007 and entered into force on 1 December 2009. Treaty of Lisbon amended the previous treaties of EU. However, the Treaty of Lisbon did not replace the previous treaties<sup>63</sup>.

Regarding trademarks, Article 118 TFEU<sup>64</sup> is relevant as it provides the authority for specific organs of the European Union to enact legislation on intellectual property protection. These specific organs of the European Union have used this right as well. Regarding trademarks, the most significant legislations on the European level have been enacted as both directive and regulation. These two forms of legislations differ slightly from each other. Regulation is binding the Member States generally. It is in all respects,

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<sup>60</sup> Ibid, p. 72.

<sup>61</sup> Ibid.

<sup>62</sup> Article 1(3) TEU.

<sup>63</sup> Ojanen 2010, p. 6.

<sup>64</sup> Article 118 TFEU: In the context of the establishment and functioning of the internal market, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union and for the setting up of centralised Union-wide authorisation, coordination and supervision arrangements.

The Council, acting in accordance with a special legislative procedure, shall by means of regulations establish language arrangements for the European intellectual property rights. The Council shall act unanimously after consulting the European Parliament.

and it is applied as it is in all Member States of the European Union.<sup>65</sup> Because regulations are directly effective on the Member States, there is no need for enactment for the national legislation in order to be effective.<sup>66</sup> The directive is binding concerning the result achieved, each Member State of the EU for which it is addressed. The form and methods are left for the national authorities.<sup>67</sup> Directive differs from regulation, as it has no direct effect on the Member States. Thus, the Member States may consider their special national characteristics when implementing the directive.<sup>68</sup>

The first Trademark Regulation<sup>69</sup> was published in 1993 and entered into force in 1994. The first Trademark Regulation has been amended several times. Due to the nature of regulations, these are directly applicable rules imposed on the Member States. Thus, Trademark Regulation is applied as it is in the Member States. The Trademark Regulation is significant because it created the base for Community Trademark.<sup>70</sup>

The first Trademark Directive<sup>71</sup> was published in 1988, which was earlier than the first regulation. Like the first regulation, this directive has been amended a couple of times as well.<sup>72</sup> The target of the first Trademark Directive was to align the central principles from the upcoming Trademark Regulation. As the nature of the directive is that the measures of the achieved result are left for the national authority, the interpretations are not likely to be strictly aligned within the Member States. However, the Trademark Directive is not targeting to perfect harmonisation. Instead, it is focusing on the relevant parts of the single market. The purpose is to create similar preconditions on registering a trademark within European Union and decrease the amount of protected and registered trademark. The aim

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<sup>65</sup> See Article 288 TFEU.

<sup>66</sup> Hartley 2014, p. 216.

<sup>67</sup> See Article 288 TFEU.

<sup>68</sup> Hartley 2014, p. 218.

<sup>69</sup> Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark.

<sup>70</sup> Salmi – Häkkänen – Oesch – Tommila 2008, p. 100.

<sup>71</sup> Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks.

<sup>72</sup> Currently valid is Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade mark.

is to facilitate the free movement of the products and the services.<sup>73</sup> In addition, the protection granted for a trademark cannot vary from Member State to Member State.<sup>74</sup>

## 2.2. TRIPS

### 2.2.1. The Paris Convention and the Berne Convention

Before TRIPS entered into force, there were two significant conventions before, the Paris Convention and the Berne Convention. Both of these were negotiated in the 1880s. Last revisions on these were made in the 1960s, excluding Appendix added to the Berne Convention in 1971. Even though, TRIPS included an effective enforcement mechanism in the field of international intellectual property, the majority of the substance was created in previous conventions already.<sup>75</sup> The Paris Convention was signed in 1883. It entered into force in the next year of the signing, on 7 July 1884. It is administrated by WIPO, which was founded in 1968. The Paris Convention is the most important treaty in the light of trademarks.<sup>76</sup>

The Paris Convention had two main intention. The first one was, “to extend to all member nations the principle of national treatment in other words, the obligation to treat foreign nationals no less favourably than nationals.” In addition, the other one was, “to guarantee the minimum standards of protection for patents, industrial designs and *trademarks*.”<sup>77</sup> More harmonisation was possible to create later because the member countries increased their level of protection by enhancing national legislation regarding intellectual property in question.<sup>78</sup> As an example, regarding trademarks, the Paris Convention contained the following provisions, which still have quite same content: protection for well-known marks, the registration and independence of trademarks and limitation to registration and use trademark that is consisting or containing and official symbol or hallmark.<sup>79</sup>

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<sup>73</sup> Salmi – Häkkänen – Oesch – Tommila 2008, p. 98. However, regarding trademarks there are other binding rules in addition to TFEU, directives and regulations. Thus, it is necessary to understand these are just the most significant ones.

<sup>74</sup> Joined Cases C-414/99 to C-416/99 Davidoff v Levi Strauss, paragraphs 41–42.

<sup>75</sup> Frankel – Gervais 2016, p. 17.

<sup>76</sup> Cohen Jehoram – van Nispen – Huydecoper 2010, p. 41.

<sup>77</sup> Frankel – Gervais 2016, p. 17. Emphasis added.

<sup>78</sup> Ibid, p. 18.

<sup>79</sup> Ibid, pp. 19, 21–22.

The Berne Convention was signed in September 1886. The Berne Convention is similar to the Paris Convention, but the content is about copyright.<sup>80</sup> Thus, in the light of this thesis, further introduction on that is not necessary. However, as previously stated, worth to mention regarding the Berne Convention, both the Paris Convention and the Berne Convention created the substance ground for TRIPS. The IP taxonomy of these two conventions can be represented as follows, see Figure 2.

The Paris Convention – Industrial Property	The Berne Convention – Literary and Artistic Property
<ul style="list-style-type: none"> <li>• Patents</li> <li>• <i>Trademarks</i></li> <li>• Trade secrets</li> <li>• Designs</li> <li>• <i>Unfair competition</i></li> <li>• Geographical indications</li> </ul>	<ul style="list-style-type: none"> <li>• Author’s rights</li> </ul>

*Figure 2.* How the intellectual property taxonomy of these two conventions can be represented.<sup>81</sup>

### 2.2.2. TRIPS – Setting the Minimum Standards for Intellectual Property Protection

After various revisions in the Paris Convention and the Berne Convention, TRIPS Agreement was created and established. WTO administrates TRIPS.<sup>82</sup> TRIPS “has the most dramatical impact on intellectual property rules.”<sup>83</sup> TRIPS Agreement was signed on 14 April 1994 and entered into force on 1 January 1995.

<sup>80</sup> Ibid, p. 25.

<sup>81</sup> Pila – Torremans 2016, p. 32. Emphasis added.

<sup>82</sup> Frankel – Gervais 2016, p. 9.

<sup>83</sup> Ibid, p. 28.

TRIPS was significant because it set up an international framework of the Paris Convention and the Berne Convention. The framework created the backbone for the protection and recognition of intellectual property rights. It imposed on the member states the minimum standards of intellectual property protection. In other words, this means the member states<sup>84</sup> to include such provisions on their national legislation.<sup>85</sup> In addition, provision “most favoured nation<sup>86</sup>” was added. Its content is that “[a]ny state that confers benefits on the nationals of another state must extend the same benefits immediately and unconditionally to the nationals of all other member states, even if the treatment is more favourable than that which the conferring state accords to its own nationals.”<sup>87</sup> Regarding the EU, probably the most the main impact was that the EU signed TRIPS. Basically, this means that “TRIPS Agreement generates legal effects within the EU legal order and establishes a general jurisdiction for the Court of Justice with respect to its provisions.”<sup>88</sup> Worth to mention, even though TRIPS set out the minimum requirements on member states on their national legislation, member states may still have stricter provisions as TRIPS just provides the minimum standards. Even though TRIPS is not directly applicable in the EU’s legislation, the EU legislation and the Member States’ national legislation should follow TRIPS *as far as possible in the light of the wording and purpose*.<sup>89</sup>

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<sup>84</sup> Referring to WTO’s member states.

<sup>85</sup> Pila – Torremans 2016, p. 34.

<sup>86</sup> Articles 3 and 4 TRIPS.

<sup>87</sup> Pila – Torremans 2016, p. 35.

<sup>88</sup> Ibid.

<sup>89</sup> Case C-89/99 Schieving-Nijstad v Groeneveld, paragraph 35; Case C-49/02 Heidelberger Bauchemie, paragraphs 19–21; Case C-53/96 Hermés International v FHT Marketing Choice, paragraph 28; Case T-201/04 Microsoft v Commission, paragraph 798. Emphasis added.



### 3. Luxury Brands

#### 3.1. Types of Brands

##### 3.1.1. Brand

Generally, the brand is referring to “a name, design, or symbol that distinguishes the goods or services of one seller from those of competitors through -- added value. The brand’s added value is a modern construct of negotiated relations at the center of all exchanges and interactions among consumers, businesses, and marketing climates.”<sup>90</sup> However, an official definition for a brand may also be looked for, for example, from ISO 10668:2010 standard “Brand valuation – Requirements for monetary brand valuation”.<sup>91</sup> Thus, the definition may vary from each other as it is dependent on the perspective from which is looked for.

Nowadays, brands distinct the products and services in the markets from each other. In addition, it is usually a mark of origin. The consumer may trust the product is produced in a certain place with a certain manufacturing method. Thus, the brand is an assurance of the quality. A product that is branded may be held as good quality or to be united for a certain price frame of reference. A brand can also be referred to the added value that the consumers are ready to pay of the product or service compared to the similar generic products or services. Brand may also effect on the demand for products and services.

So-called brand loyalty may lead to increased demand and to better price premium. Brand may also be referred to consumer’s habit to express himself or herself. Consumer forms a bond on the brand. In the best situation, the brand gets consumer’s interest in the product, service or company and tells afterwards about it for the other consumers. The asset for the brand is that strong brand may help even on recruiting people and customers. In addition, the brand is communication as well. Powerful images and associations develop a strong bond on consumers and thus may lead to a significant increase on profitability. Derived from this, negative publicity can have a straight impact on profitability as well. Brand contains multiple stories, feelings and images of the company

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<sup>90</sup> Bruce – Erihoff – Lindberg – Marshall 2007, p. 49.

<sup>91</sup> See further International Standard ISO 10668, ‘Brand valuation — Requirements for monetary brand valuation’ (ISO 2010) available at <[farsi.tpo.ir/uploads/iso\[1\].pdf](http://farsi.tpo.ir/uploads/iso[1].pdf)> (accessed on 29 October 2018).

and its' products and services provided. However, products and the associations need to be protected.<sup>92</sup>

As it can be seen, there is no final, finished and one explicit definition for the brand and could it be as a brand as a definition evolves all the time. struggle to define brand is because the brand is not unambiguous, but it consists of different factors depending on circumstances in question.<sup>93</sup> However, as previously demonstrated, it is evident that the brand has multiple advantages on various sectors.

In general, brands may be divided into different categories such as product brands, service brands and personal brand. Product brands' core is a product in the markets, which is normally a concrete object. Product may be based on an innovation patented, or it may be produced of special material. The packing of the product may have a significant role in the emergence of purchase. Services are usually tied to persons providing and receiving services. Service is often tied to a specific place and is recurring. Service brand's core areas are the quality of the service and the being and way to act as a service provider as well as the nature where the service is provided. Personal brand's core is in a specific person. The person has some special skills or recognition achieved of which the brand owner wants to tie as a part of his or her brand. The brand owner might be a person himself or herself or his or her company or another party who has a right to use it.<sup>94</sup> In addition, for the three types of brands, even corporates may brand themselves.<sup>95</sup>

The brand as a whole cannot be owned by a single party because it is not just a piece of an objective or even a tangible object, or just a trademark symbol but a whole set of elements that are both concrete and abstract that all along all the time lives along with both the brand and others. Thus, it is necessary to review what brands' elements can be owned.<sup>96</sup> At first, obviously the product itself can be owned. However, right after assignment of the product, the brand ownership is transferred to the purchaser, and thus the reputation of the brand is tested. Manuals are useful in the light of the image of the brand because those may retain the image gained. The basic work is already done before selling the product, but the image may also be improved in the secondary markets. For

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<sup>92</sup> Innanen – Jäske 2014, pp. 25–27.

<sup>93</sup> Kivi-Koskinen 2003, p. 105.

<sup>94</sup> Ibid, pp. 106–107.

<sup>95</sup> Desai 2012, p. 994. See more on pp. 994–999.

<sup>96</sup> Kivi-Koskinen 2003, p. 111.

example, by providing maintenance the brand holder may have an impact on the age of the product or other relevant and positive characteristics of the product.<sup>97</sup>

Regarding intangible assets, the brand holder may own products in the light of copyright if the threshold of a piece of work exceeds.<sup>98</sup> Reflection on that, in the light of trademarks, trademarks can be owned by the trademark holder as they are registered. Trademarks have a significant relevance on protecting brands. Trademarks allow the trademark holder to have exclusive rights on the mark registered which means that the trademark holder has the right to forbid others from using any element related to the brand which can be protected under applicable law. This is the cornerstone for laws of brand and strategies of branding. This part is usually the most important part of a company's intangible assets or even assets as a wholly owned by the company<sup>99</sup>.

### **3.1.2. Luxury Brand**

Luxury products are offered by luxury brands.<sup>100</sup> Particular brands are called luxury brands. It is necessary to understand why some may be called as luxury brands and what factors give the superior position on markets. Luxury brands are closely considered. The factors that luxury products have are the strength of the brand, distinction, exclusivity, premium pricing, innovation, high quality and precision on production. Often luxury goods are considered to be expensive. However, it is necessary to highlight that not all expensive products are considered to be luxurious.<sup>101</sup> Nowadays the idea of luxury is often associated with brands that are exclusive and expensive. Pricing has its basis on, for example, using the best materials and background credibility.<sup>102</sup> In addition, marketing regarding luxury products is very specific and does not follow the regular marketing.<sup>103</sup> This method makes luxury products and/or services available only for a few consumers who can afford them.<sup>104</sup> Heine defines that “luxury brands are regarded as images in the

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<sup>97</sup> Ibid, pp. 111–112.

<sup>98</sup> Ibid, pp. 112–115.

<sup>99</sup> Ibid, p. 116.

<sup>100</sup> Heine 2011, p. 47.

<sup>101</sup> Som – Blanckaert 2015, pp. 6–7.

<sup>102</sup> Bruce – Erihoff – Lindberg – Marshall 2007, p. 252.

<sup>103</sup> Som – Blanckaert 2015, p. 92.

<sup>104</sup> Sun 2015, p. 411.

minds of consumers that comprise associations about a high level of price, quality, aesthetics, rarity, extraordinariness and a high degree of non-functional associations.”<sup>105</sup>

Term luxury goods were established as well by Wall Street analysts in need for companies such as LVMH and Richemont. Before the definition, these companies were not known as luxury good companies but instead of expertise and global reputation.<sup>106</sup> The Boston Consulting Group established the following definition: “[i]tems, products, and services that deliver higher levels of quality, taste, and aspiration than conventional ones.”<sup>107</sup> Bernard Arnault<sup>108</sup> has highlighted that luxury goods are also about brands. He has defined that “star brands should be timeless, modern, fast-growing, and highly profitable.”<sup>109</sup> Arnault also had stated that there are fewer than 10-star brands in the luxury world.<sup>110</sup> In addition, utilitarian brands are focusing on the relevant information of the product whereas luxury brands are focusing on expressing information on the buyer as well.<sup>111</sup> Luxury products (and brands) can be illustrated as follows: a person with a desire to have a Louis Vuitton handbag is not satisfied with a handbag from Mulberry. The brands are not even competitors in this person’s need; even the price would be close to each other. It is stated that the luxury brand’s core is especially in the product and background<sup>112</sup>.

However, there is no one and only definition of luxury brands. What is held luxurious may be luxurious for others and for others not. Others may succeed to be luxurious in time, others not. The markets on luxury products are dynamic, and thus the definition is as well. New luxury brands are emerging time after time.<sup>113</sup> Luxury brands’ status may be lost when consumers’ practices change. Thus, luxury today may not be luxury tomorrow.<sup>114</sup> Therefore, consumers’ practices have a considerable role when defining the meaning for luxury.

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<sup>105</sup> Heine 2011, p. 46.

<sup>106</sup> Som – Blanckaert 2015, p. 29.

<sup>107</sup> Ibid, p. 30.

<sup>108</sup> The Chairman and CEO of LVMH.

<sup>109</sup> Som – Blanckaert 2015, p. 31.

<sup>110</sup> Ibid, p. 31.

<sup>111</sup> Biagioli – Chander – Sunder 2015, p. 77.

<sup>112</sup> Som – Blanckaert 2015, p. 94.

<sup>113</sup> Ibid, pp. 44–45.

<sup>114</sup> Bruce – Erihoff – Lindberg – Marshall 2007, p. 252.



*Figure 3.* Expression on how general brand differs from a luxury brand.

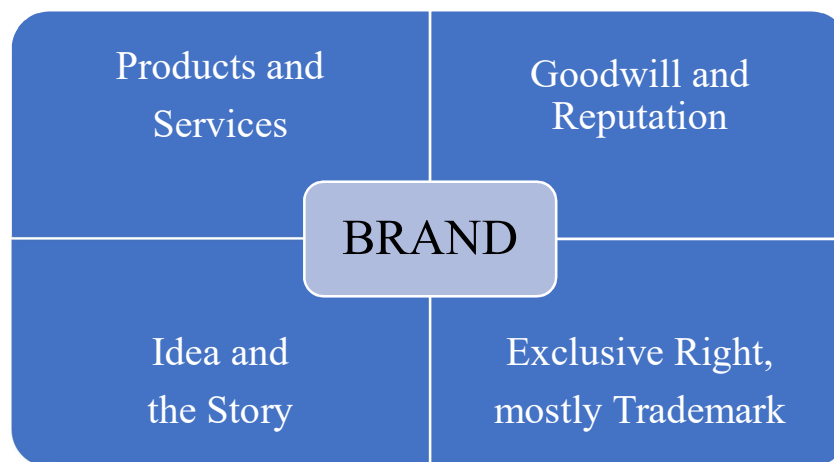
### 3.2. The Relationship between Trademarks and Brands

Usually, brands and trademarks are treated as synonyms for each other. However, brands are necessary to understand comprehensive and those are not always limited only for one name of the company or an individual trademark registered. The brand has an impact on all business activities and all business activities have impact on the brand.<sup>115</sup> Trademark has protection under legislative basis whereas brand is not even a legal definition. The brand often consists of product's elements and characteristics relating to marketing, such as name, form, packaging, and images et cetera.<sup>116</sup> Thus, the relationship between trademark and brand is mutual. In order brand to maintain its reputation for quality and exclusivity, luxury product companies must constantly protect their intellectual properties, such as trademarks, against infringements. For example, Louis Vuitton is well-

<sup>115</sup> Innanen – Jäske 2014, p. 24.

<sup>116</sup> Salmi – Häkkänen – Oesch – Tommila 2008, p. 45.

known as an active litigant regarding their intellectual property.<sup>117</sup> Still, it is noteworthy that trademarks are only one factor among others when considering the structure and content of brands. As previously stated, brand consists of various factors.



*Figure 4.* Some of the factors from which a brand is consisting of.

Brand reflection has been emphasised lately in the light of trademarks. So-called brand-thinking has taken place in discussions. To an ever-increasing degree, trademarks are used in order to create images instead of differentiating products from each other. Products and services are time after time sold based on reputation and image instead of the real quality of the product or the service. Thus, brand thinking pays attention to the fact that with a successfully built trademark may be guaranteed more profitable pricing and keep consumers loyal for the product or service.<sup>118</sup> Especially for luxury brands, trademarks are important. Trademark protection is necessarily needed against dilution and free riding of other operators in the markets.<sup>119</sup>

<sup>117</sup> Beebe 2015, p. 4.

<sup>118</sup> Palm 2002, pp. 308–309.

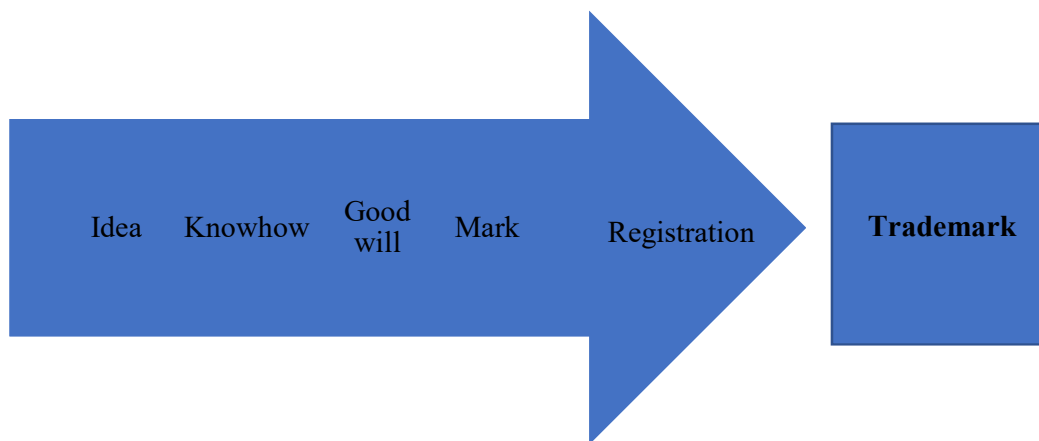
<sup>119</sup> Ibid, p. 41. Recent case law highlight the importance on protecting the products with a trademark. In case C-85/16 P Tsujimoto v EUIPO, ECJ concluded that using KENZO as a trademark in products that are a part of luxury sector is prohibited as the products would gain unfair advantage of the reputation and image of KENZO trademark. Even though KENZO is just a part of the mark, it is enough to create the possibility for unfair advantage in markets.

IPRs in general are valuable for companies as they protect brands. Trademarks need registration in order to be protected. Thus, it is essential for companies at the beginning of their operations to notice that. It can be said that IPRs protected to increase the company's assets. IPRs are important, for example, for start-ups due to the following reasons. At first, exclusive rights create protection from the competitors. Especially in the start-up world, competition is hard. Bigger companies supervise their rights aggressively. Registration makes acting in markets possible for start-ups. Registration made in good time prevents possible disputes. Secondly, exclusive right makes concerning on competitors abusive act possible because exclusive right means as well a possibility to control the use of the right and to forbid other companies the right of use. Third, IPRs are not diminished in use in the same way as other physical property. Using IPRs effectively and strategically, the use may even increase the value. Fourthly, IPRs make the operation of start-up flexible and make exits possible. Active registration of IPRs makes transferring goodwill to the party continuing operations. Fifth, registration of IPRs start-up's variable business idea becomes concrete. Moreover, sixth, gaining financing is challenging without registrations. Experienced investors normally verify the IP-portfolio before making any decisions on investing.<sup>120</sup>

Even though, the above-mentioned importance on registration of IPRs is evaluated in the light of start-ups, these points can certainly be reflected to other company forms as well. If the protection is necessarily needed already for the company being at the stage of start-up, companies that are more advantaged in the market and have a reputation fundamentally need the protection. I argue it is crucial for such companies in order to succeed in the markets. Thus, more developed companies have similar or even greater incentives to take care of their IPRs, especially trademarks. The points presented above, are vital for companies in order to be competitive in the markets. As a summary, intellectual property right protection is essential for companies, which are aiming to brand their products now or in the future.

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<sup>120</sup> Honkinen – Innanen – Lindgren – Pello – Rantanen – Siltala – Tuomala 2016, pp. 79-83.



*Figure 5.* How brand unites to trademark.

### 3.3. Case Louboutin

In order to highlight the strong relationship between trademark and brand, recent case law illustrates this relationship perfectly – brand and trademark are highly connected with each other but still two divergent matters. Christian Louboutin won a key legal case in June 2018 regarding red soles of high-heeled shoes. In 2009, Louboutin had filed an application on registering a trademark regarding the red colour of a sole of a shoe. In 2012, Van Haren had sold shoes with a red sole. ECJ had to evaluate whether the red sole consisted of “shape” within the meaning of Article 3(1)(e)(iii) of Directive 2008/95. ECJ concluded that it did not consist exclusively of a “shape” within the meaning of the provision mentioned above.<sup>121</sup>

ECJ’s conclusion confirmed that the grounds for refusal or invalidity for trademarks, set on Directive 2008/95, does not apply for Louboutin. However, ECJ’s conclusion was held a bit surprising as the EU’s advocate general had previously concluded contrary to ECJ’s conclusion. Advocate general concluded that such red soles could not be protected because they relate to a shape within the meaning of Article 3(1)(e)(iii) of Directive 2008/95.<sup>122</sup>

<sup>121</sup> Case C-163/16 Louboutin v Haren Schoenen.

<sup>122</sup> Opinion of Advocate General, on 22 June 2017, paragraph 73; Opinion of Advocate General, on 6 February 2018, paragraph 67.



Why is the case relevant? Case Louboutin is a great example of how brands and trademarks differ from each other. It may be argued that Louboutin's intention to file a suit against Van Haren was to protect the brand's reputation. However, noteworthy is to recognise the difference between brand and the trademark in this case. Louboutin itself is the brand whereas the red sole and the shape of the sole is the trademark. Thus, the trademark, in other words, the red sole of the high-heeled shoe, is a part of the Louboutin brand. Consequently, the relationship between brand and trademark is evident.

However, as previously already stated, the case Louboutin conclusion was a bit unexpected. The advocate general stated with an opposite conclusion. It is clearly stated in Article 3(1)(e)(iii) of Directive 2008/95 that shapes are under grounds for refusal or invalidity. It may be argued or at least questioned whether Louboutin's strong and stable reputation of the brand influenced on the ECJ's conclusion as colour and shape are not necessarily always enough for protection of intellectual property. ECJ's reasoning is brief and it may leave some questions open. It will remain to be seen whether future case law regarding brands with a good reputation will be in accordance with ECJ's conclusion on case Louboutin. Obviously, it seems that Louboutin may now have a certain monopoly for producing high heels with a red sole<sup>123</sup>.

The ambiguous nature of having a trademark for shape can also be recognised in the food conglomerates. A few conglomerates, such as Nestlé and Unilever, dominate the food industry. The recent discussion and ambiguity were with KitKat's trademark protection. ECJ concluded that KitKat's four-fingered chocolate bar did not get protection within the whole area of the European Union. Thus, it upheld its previous ruling.<sup>124</sup> The ambiguity, in this case, may be argued if products close to each other are considered. Toblerone's pyramid blocks are trademarked. However, KitKat's four-finger shape will not have the same protection because the shape is not recognised. Ambiguity is clear, and it highlights the problem with registering marks, which are consisting of shapes. At the same time, Toblerone has succeeded to register a trademark on its pyramid block whereas KitKat not. Thus, it is uncertain of what kind of brands and products trademarks are allowed to grant. In this case, both are chocolate bars, so how would they differ from each other?

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<sup>123</sup> Harriet Agnew, 'Shoe designer Christian Louboutin wins ECJ case over red soles' *Financial Times* (12 June 2018) available at [www.ft.com/content/9146d13a-6e5a-11e8-852d-d8b934ff5ffa](http://www.ft.com/content/9146d13a-6e5a-11e8-852d-d8b934ff5ffa) (accessed 10 September 2018).

<sup>124</sup> Joined Cases C-84/17, C-85/17 P and C-95/17 P Nestlé v Mondelez.

Moreover, where does the limit go when considering whether the shape is recognised and when not?<sup>125</sup>

### 3.4. Luxury Brand Conglomerates

Conglomerate refers to a corporation which products and services are from several sectors of industries. Industries are unconnected. It may also be called as multi-market or multi-industry company. The conglomerate has both financial and managerial control over the products and the services.<sup>126</sup> Basically, this means the conglomerate itself is a parent company and the businesses acquired are its subsidiaries. This will lead to a significant economy of scale<sup>127</sup>. Conglomerate usually have a portfolio of different brands of which they are selling.<sup>128</sup> Thus, the characteristic of the conglomerate is that it operates in various product categories. The structure may be that the parent company still controls its fully owned subsidiaries.<sup>129</sup>

Family businesses run the luxury industry before big luxury brand conglomerates came through. Bernard Arnault and Henry Racamier were the drivers of luxury businesses. It is stated that Bernard Arnault created the luxury empire of today as he turned fashion to business. Arnault created LVMH, the leading luxury brand conglomerate, by buying and selling companies. Arnault found new brands, mixed and matched with designers and management teams. Slowly, conglomerates such as LVMH, Richemont and Kering have acquired multiple brands and conglomerates were established. However, families still own some companies, such as Chanel.<sup>130</sup> Thus, conglomerates are created by gathering various companies together, under the same parent company.<sup>131</sup> “Conglomerate mergers” bring together businesses, which are unrelated with each other, and this is a significant

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<sup>125</sup> See more about questioning this ambiguity for example Kameron Virk, ‘Kit Kat case: The food and drinks with trademarked shapes’ *BBC* (25 July 2018) available at <[www.bbc.com/news/newsbeat-44953460](http://www.bbc.com/news/newsbeat-44953460)> (accessed 17 October 2018).

<sup>126</sup> Jacoby 1970, p. 35–36.

<sup>127</sup> *Ibid*, p. 36.

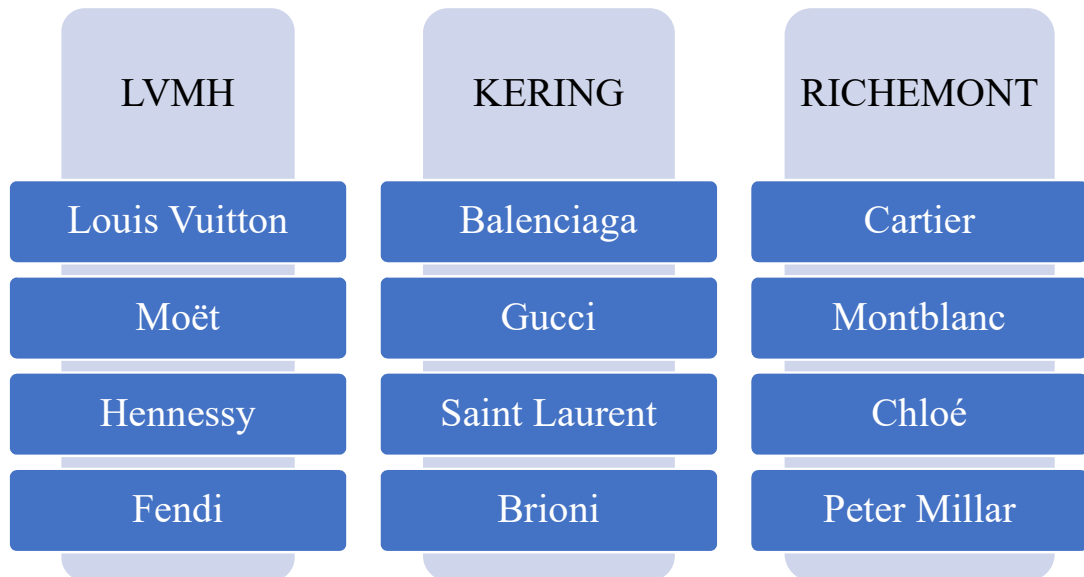
<sup>128</sup> Som – Blanckaert 2015, pp. 11–12.

<sup>129</sup> Colpan – Hikino 2010, p. 27.

<sup>130</sup> Som – Blanckaert 2015, pp. 39–40.

<sup>131</sup> The recent acquisition in the area of luxury brand conglomerates was published on 25 September 2018 when Michael Kors bought Gianni Versace SpA (Kim Bhasin and Robert Williams, ‘Michael Kors Buys Fashion Label Versace for \$2.2 Billion’ *Bloomberg* (25 September 2018) available at <[www.bloomberg.com/news/articles/2018-09-25/michael-kors-buys-high-fashion-label-versace-for-2-2-billion](http://www.bloomberg.com/news/articles/2018-09-25/michael-kors-buys-high-fashion-label-versace-for-2-2-billion)> (accessed 27 September 2018)).

part of its growth.<sup>132</sup> Considerably large luxury brand conglomerates on the luxury market are LVMH, Kering and Richemont.



*Figure 6.* Expression what brands luxury brand conglomerates include.

Moët Hennessy Louis Vuitton (LVMH) is the world's leading luxury brand conglomerate. This luxury products group was founded in 1987. LVMH reported its revenue in 2017 to be €42.6 billion<sup>133</sup>. LVMH consists of 70 houses, which all create products that are considered high quality. LVMH is as well the only group that provides all major areas of the luxury market. These are fashion & leather goods, perfumes & cosmetics, selective retailing, watches & jewellery and wine & spirits.<sup>134</sup> As a premier supplier of luxury goods LVMH has gained well-established reputation. LVMH caters high-end consumers.<sup>135</sup> LVMH distributes its products worldwide through its owned boutiques and licensed distributors.<sup>136</sup>

As previously stated, LVMH was created by selling and buying companies and mixing and matching the right personnel and brands together. Thus, LVMH's strategy is clear.

<sup>132</sup> Jacoby 1970, p. 35.

<sup>133</sup> LVMH 2017 record results (Paris, 25 January 2018) available at <[r.lvmh-static.com/uploads/2018/01/lvmhannualresults2017va.pdf](http://r.lvmh-static.com/uploads/2018/01/lvmhannualresults2017va.pdf)> (accessed 28 September 2018).

<sup>134</sup> LVMH 'The LVMH Model' available at <[www.lvmh.com/group/about-lvmh/the-lvmh-model/](http://www.lvmh.com/group/about-lvmh/the-lvmh-model/)> (accessed 28 September 2018).

<sup>135</sup> Davis 2010, p. 177.

<sup>136</sup> Som – Blanckaert 2015, pp. 51 and 53.

As LVMH is the leading luxury brand conglomerate, it is justified to argue to be a significant operator in luxury product markets as well. LVMH is still growing its portfolio of various products as it can be seen from the European Commission's decisions. European Commission has adopted multiple decisions on the merger control of LVMH where it has concluded that LVMH's mergers have been allowed in the light of competition<sup>137</sup>. Probably the main reason the acquisitions are allowed time after time is due to LVMH's company structure. As the nature of conglomerate is that the portfolio of products is wide, LVMH brands' products are not all the same. For example, wines and leather goods are not necessarily operating in the same product markets, even though both of these are operating in the luxury market.

### **3.5. Effect of Luxury Brand Conglomerates**

The effect of luxury brand conglomerates is significant when considering their rise in the markets. Luxury trademarks<sup>138</sup> may be argued to be the ambassadors of luxury brand conglomerates. Previously, trademarks, which were held to have the luxury nature, was an indication of the detailed and accurate creation. The luxury trademarks are nowadays mass-marketed, and the previous composition has been forced to prevail. It has been argued this phenomenon have had a descending impact on luxury brands. Instead of promoting the origin of the product and the best quality, the focus is on 'luxury for everyone' –perspective, in other words, promoting luxury for mass consumption<sup>139</sup>. This action has been called as a messenger of an aura of luxury.<sup>140</sup> Thus, it is evident luxury brand conglomerates have changed the concept of luxury trademarks. However, I argue that the new perspective for distributing luxury goods for wider audience meets with the competition aspect better. More about the relationship between competition and luxury brand conglomerates in Chapter 5.

It is justified to argue that luxury brand conglomerates had, and still have, impact on the luxury industry. Moving from family-owned businesses to multinational corporations in

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<sup>137</sup> See, for example, Commission Decision Case M.8509 – LVMH / MARCOLIN / JV; Commission Decision Case M.7568 – M1 FASHION / LVMH / PEPE JEANS GROUP.

<sup>138</sup> Luxury trademark is referring to a trademark of a product, which is considered to be luxury, such as Louis Vuitton.

<sup>139</sup> Mass consumption should not be understood in this context as it is normally understood. Mass consumption in this context refers to prestige for the masses, which gain more profits and is not that keen on the superior quality (Calboli 2015, p. 32).

<sup>140</sup> Calboli 2015, p. 32.

luxury products have changed the role of luxury trademarks as well. More previously noted, luxury trademarks nowadays are rather indicating assets than origin. Luxury trademarks are as well argued to be tools for multinational corporations in order to aim a larger market, target consumer group and income. Luxury products facilitated on broader market levels making the expansion easier – more consumers were reached out.<sup>141</sup>

However, luxury brand conglomerates have not completely abandoned the previous circumstances of the luxury industry before the transformation described. Even though the aim of luxury brand conglomerates is to broaden the market and thus gain more profit, they still have ‘pyramid’ structure on their products. On the top of the pyramid are the products, which are the exclusive products with the highest quality whereas at the bottom are products targeted for mass consumption, in other words, for mid- and entry-levels of the market.<sup>142</sup> The lower the product is in the pyramid the more affordable it is for consumers.<sup>143</sup> The idea of this structure is that still, some products are on the top, in other words, presenting the superior quality. The products underneath of the high-end exclusive products are still under the impact of the product on the top of the pyramid. Thus, the product on top is enhancing the prestige of the products at lower levels of the pyramid. Therefore, it is evident that luxury trademarks have a significant role regarding this process around the pyramid. If the luxury trademark is recognised on the top of the pyramid, its success to carry the prestige image all the way for the bottom where the products appointed to mass consumption are. In addition, luxury trademark identifies products from the others in the market. Thus, the luxury trademark is preferably acknowledged as property of the luxury brand conglomerate instead of the origin and quality.<sup>144</sup>

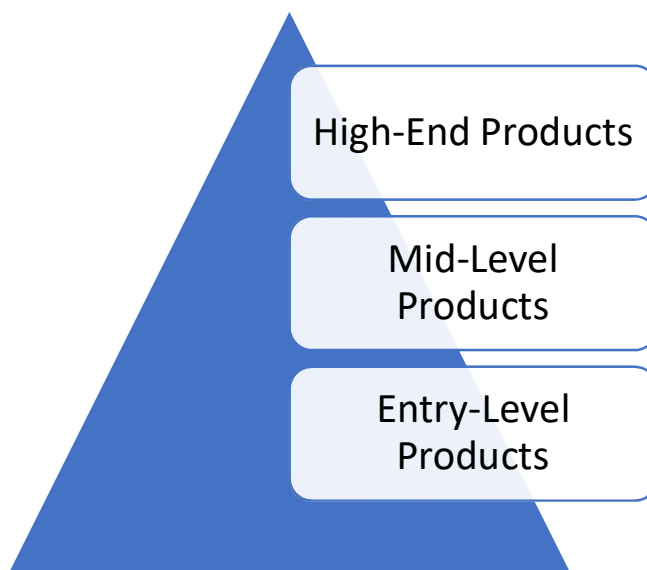
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<sup>141</sup> Ibid, p. 38.

<sup>142</sup> In fact, this division is lucrative. Brands, such as Michael Kors and Ralph Lauren, have focused on the lower level luxury products. These brands’ profit is mainly earned from such products (Vanessa Friedman, Rachel Sanderson and Scheherazade Daneshkhu, ‘Fashion: Luxury’s new look’ *Financial Times* (23 December 2012) available at <[www.ft.com/content/2f99fcc6-4aef-11e2-929d-00144feab49a](http://www.ft.com/content/2f99fcc6-4aef-11e2-929d-00144feab49a)> (accessed 5 November 2018).

<sup>143</sup> Parekh – Paliwal 2017, p. 1158.

<sup>144</sup> Calboli, p. 39.



*Figure 7.* The pyramid model that luxury brand conglomerates are argued to use.

It is argued as well that luxury brand conglomerates have had an impact on the protection of luxury trademarks.<sup>145</sup> Luxury trademarks are commonly protected against infringements as other trademarks as well. However, luxury trademarks are also protected against dilution. The reason for this is that luxury trademarks are considered to be famous marks<sup>146</sup> but representing high quality at the same time. Luxury brands have, to an increasing extent, turned recently from handmade luxury products to massively marketed luxury products, still, the same target group exists. In addition, the aura of luxury seems to be more relevant than the origin of the product.<sup>147</sup> Protection from dilution has changed as it was considered to be a tool for save the uniqueness of the product where it is now considered rather keeping the status and exclusivity on.<sup>148</sup> The effect on trademark protection of luxury brand conglomerates is evident.

However, it is argued that trademark laws are not sufficient way to protect this status function by giving more protection on the luxury trademarks as trademark legislations are considered to boost efficiency by communicating the origin and quality.<sup>149</sup> As luxury brand conglomerates came and the transformation started, luxury trademarks are

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<sup>145</sup> Ibid, p. 46.

<sup>146</sup> Famous marks enjoy higher protection (Ibid, p. 41).

<sup>147</sup> Ibid, pp. 31–32.

<sup>148</sup> Ibid, p. 34.

<sup>149</sup> Ibid, p. 36.

considered to be a tool for new markets, consumers and profits.<sup>150</sup> Because big luxury corporations' luxury products were better identified the aura of luxury was identified in all levels of the pyramid and was laid down for mass consumption. Due to the recognition of the importance of luxury trademarks, luxury corporations started to demand higher protection for trademarks in general.<sup>151</sup> However, the higher protection can be argued to be justified only for the economic perspective – business assets are high. This is still inconsistent with trademark law.<sup>152</sup> Thus, it is justified to argue that the rise of luxury brand conglomerates effected on the required level of protection regarding luxury trademarks.

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<sup>150</sup> Ibid, p. 38.

<sup>151</sup> Ibid, p. 39.

<sup>152</sup> Ibid, p. 46.

## 4. Competition and the European Union

### 4.1. The Theory of Competition

The European competition law's main proposition is to protect the competition in order to boost the consumer welfare.<sup>153</sup> At the same time trademarks grants exclusive rights for the trademark holder. Thus, it is justified to argue that exclusive rights clashes with competition law.<sup>154</sup> Trademarks create exclusive positions where competition law is aiming to avert behaviour that restricts competition.<sup>155</sup> However, regarding the exploitation of intellectual property rights, competition law can be applied in circumstances where it restrains competition.<sup>156</sup> Thus, regarding trademarks competition law have measures for the protection of competition against the restrictive behaviour of the trademark holder. In addition, even though competition law and trademark law are evaluated primarily on the national level, it is necessary to understand the precedence between the EU and the national legislation. The relationship between the national and the EU legislation is established already back in the 1960s. Case *Costa v ENEL* established that the EU law takes precedence over the national laws. If a national law conflicts with the European Union law, the latter prevails. Thus, the European Union law has primacy over national laws.<sup>157</sup>

As former, European Commissioner Neelie Kroes has stated, “consumer welfare is now well established as the standard the Commission applies when assessing mergers and infringements of the Treaty rules on cartels and monopolies. Our aim is simple: to protect competition in the market as a means of enhancing consumer welfare and ensuring an efficient allocation of resources.”<sup>158</sup> As it has taken strongly place in contemporary society, it can be said competition has a relevant position in economy. Economic concepts are necessary to understand when considering competition aspects. In other words, when evaluating circumstances, often both legal and economic input is needed.<sup>159</sup>

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<sup>153</sup> Whish – Bailey 2015, p. 1.

<sup>154</sup> Turner 2010, p. 3.

<sup>155</sup> Kur – Dreier 2013, p. 393.

<sup>156</sup> Turner 2010, p. 3.

<sup>157</sup> Case 6/64 *Costa v ENEL*.

<sup>158</sup> Neelie Kroes, ‘Preliminary Thoughts on Policy Review of Article 82’ (23 September 2005) available at <[ec.europa.eu/competition/speeches/index\\_2005.html](http://ec.europa.eu/competition/speeches/index_2005.html)> (accessed 21 October 2018).

<sup>159</sup> Whish – Bailey 2015, p. 2.



As previously stated, it is necessary to understand the concept of economic and competition. School of Harvard and School of Chicago expresses the relationship well. School of Harvard considers competition in the light of market structure. Market structure determines how the company is operating in the market. The Harvard model on evaluation is called as SCP-model (Structure, Conduct, Performance). The school of Harvard is aiming, alongside the efficiency, to protect the freedom of traders and to protect consumers and small-enterprises from monopoly companies' despotism and unfounded income transfers. The aim is to prevent excessive centralisation of economic power.<sup>160</sup>

School of Chicago considers competition quite differently. Some procedures may be held as promoting competition even though procedures may be held at the same time restricting competition. Economic efficiency should be the cornerstone. School of Chicago perspective is that markets are self-piloting.<sup>161</sup> Thus, the difference between these two schools is evident, and it may be argued that the perspective of the EU is somewhere between these two.

#### **4.2. Free Movement and Intellectual Property Rights**

The Agreement on the European Economic Area (EEA Agreement) entered into force on 1 January 1994. EEA Agreement ensures equal both rights and obligations within the internal market in the European Economic Area (EEA). These are provided for individuals and economic operators as well. EEA Agreement supports the four freedoms covered in the EU legislation: the free movement of goods, services, persons and capital. Articles 53 and 54 EEA Agreement cover Articles 101 and 102 TFEU as well. The difference between the EEA Agreement and the EU regulatory is that the EEA Agreement also covers countries, which are not members of the European Union.

The relationship between the freedom of goods and services and intellectual property rights, especially trademarks have been expressed to be diverse. Trademarks are held to create monopolies when exclusive rights are granted for the trademark holder, and that restricts competition.<sup>162</sup> However, notable is that the EU has been uniformed trademark protection, for example, with the Community Trademark possibility to help this

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<sup>160</sup> Ojala 2011, pp. 17–18.

<sup>161</sup> Ibid, p. 18.

<sup>162</sup> Cohen Jehoram – van Nispen – Huydecoper 2010, p. 561.

controversy between the free movement of goods and the services and intellectual property rights. In addition, there are several other circumstances of which the EU has been establishing to relieve the tension between the two, but in this thesis, I am not going any further of those.

However, one doctrine is relevant in the light of free movement and IPRs due to the territoriality of IPRs. Exhaustion of intellectual property rights is relevant when considering suitability or applicability of Article 102 TFEU. A trademark holder may not prohibit the use of the trademark in products which the holder, or with holder's consent to some other party, has placed in the market by using this trademark.<sup>163</sup> Basically, if a product is sold further under the consent of the trademark holder, the trademark holder does not have the exclusive right for the product in question anymore. Thus, the exclusive right is exhausted. From this point of view, it is relevant to notice that competition and free movement is not restricted in situations like these because the trademark holder does not have an exclusive right for the trademark anymore.

The oldest case of regarding the doctrine of exhaustion of intellectual property rights is *Deutsche Grammophon v Metro*<sup>164</sup>. This case was relevant because it did confirm that the free movement limited the IPR holder's possibility to prohibit or restrain the movement between the Member States<sup>165</sup> when the products had been distributed with the consent of the IPR holder.<sup>166</sup> In sum, even though it may seem that exclusive rights would be in contrary to free movement it is necessary to highlight, and conclude that the relationship between these two fundamental rights is not that black and white. The doctrine of exhaustion protects both the free movement but as well the IPR holder as the consent of the IPR holder is needed for distribution in the market.

### **4.3. Perfect Competition and the Exclusive Rights**

Perfect competition is the most eligible circumstance in which competition law is aiming. Perfect competition may be described, as a circumstance where markets have a lot both producers and purchasers. The market shares of the producers are small, and no producer

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<sup>163</sup> Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade mark, Article 15.

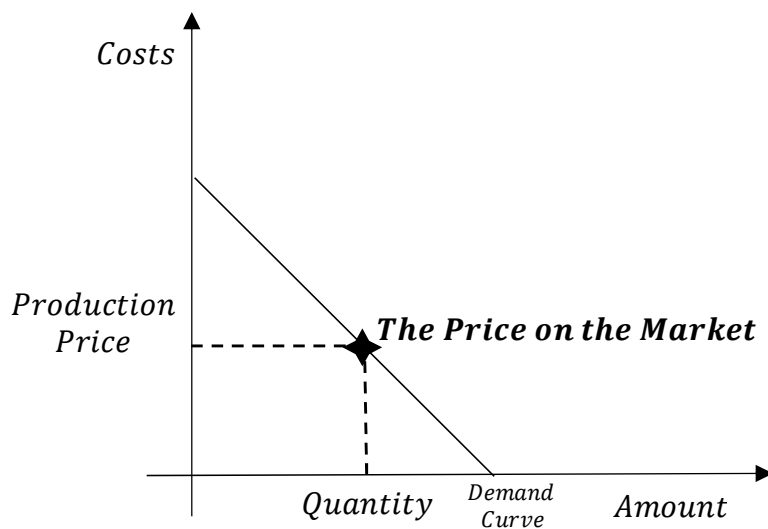
<sup>164</sup> Case 78/70 *Deutsche Grammophon v Metro GmbH*.

<sup>165</sup> At that time EEC Member States.

<sup>166</sup> Pila – Torremans 2016, p. 53.

can influence on the price and delivery terms alone. Producers sell similar goods. Producers and purchasers have perfect knowledge of the price, how it is formed and quality of the products. In addition, free access in the market and production and selling of products are not limited. In other words, perfect competition is a market form where neither purchaser nor producer has such market power where they could influence on the price of the products. However, in reality, hardly such thing appears.<sup>167</sup>

As previously stated may seem a bit theoretic, consideration that is more concrete will indicate the content of the perfect competition, and why it is desirable in the first place. Perfect competition is a circumstance where both allocative and productive efficiency, consumer and producer welfare and total welfare are maximized.<sup>168</sup> Thus, this state of competition is the most eligible from the consumer perspective. Where allocative and productive efficiency is on the top, it means that products' prices are on the level of which the consumers are ready to pay, and prices are close to the actual costs they have cost for the producer and the product cost level is low.<sup>169</sup> Thus, the welfare is great as well. See Figure 8.



*Figure 8.* Expression on how perfect competition work in practice and how the prices are formed.

<sup>167</sup> Ojala 2011, pp. 10–11.

<sup>168</sup> Anderman – Ezrachi 2011, pp. 76–77.

<sup>169</sup> Whish – Bailey 2015, p. 5.

Perfect competition would have its benefits if it appeared. These are lower prices, better products, wider choice and greater efficiency<sup>170</sup>. Regarding this matter, it is necessary to explain the different benefits of perfect competition more closely. At first, under perfect competition, allocative efficiency is reached out when resources have been divided in a way, which maximises their benefit.<sup>171</sup> It is impossible to make better products without making other product worse.<sup>172</sup> In case of luxury trademarks and brands, this would mean that the luxury products are sold with the price that consumers are ready to pay in general – however, obviously this is not the situation in the market at all.

Productive efficiency under perfect competition is achieved when goods and services are produced in the most economical way, in other words costs are the lowest possible.<sup>173</sup> Thus, in the production process society's wealth is used as little as possible.<sup>174</sup> Regarding luxury trademark and brands, productive efficiency would mean that luxury products production costs are as close as possible the actual price in the market. As previously stated already considering allocative competition, the same applies here – in case of luxury trademarks and brands, these two will not meet each other. Not straight reflected from the perfect competition, dynamic efficiency becomes a further benefit of competition. Because producers need to compete from the consumers, it creates innovation. Thus, new products appear in the markets.<sup>175</sup> In the light of luxury trademarks and brands, this may materialise. However, the nature of luxury trademarks and brands may challenge the innovation level as the level of 'luxury' takes some time to gain.

As it may be argued that exclusive rights do not comply with perfect competition as those may be held to be in a monopolistic position. However, as exclusive rights may be seen as restrictive actions on competition, these may as well promote competition at the same time – on a different level of competition. Thus, the market mechanism is more practical than a simpleminded thought of division on monopoly and competition.<sup>176</sup>

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<sup>170</sup> Ibid, p. 3.

<sup>171</sup> Lorenz 2013, p. 8.

<sup>172</sup> Whish – Bailey 2015, p. 5.

<sup>173</sup> Lorenz 2013, p. 8.

<sup>174</sup> Whish – Bailey 2015, p. 5.

<sup>175</sup> Ibid, p. 6.

<sup>176</sup> Pila – Torremans 2016, p. 616.

#### 4.4. Market Definition

In order to apply both Article 102 and 101 TFEU, it is necessary to identify and define the markets where the companies are operating. When evaluating the markets, both product and geographical markets need to take into consideration, as both need to define. The relevant markets are defined when both product and geographical markets are defined, and then these are combined. Defining markets gives support on evaluating whether an undertaking might be in a dominant position or restricting competition. Market definition is necessary to make as well in the light of market shares, without making definition about markets the market shares, in other words, the market power, are challenging to solve.<sup>177</sup> Basically, when defining the relevant market, the substitutions of supply and demand are evaluated. Certain tools provide help on the evaluation, such as hypothetical monopolist test and SSNIP test (Small but Significant, Non-transitory Increase on Price).<sup>178</sup>

Especially for IPR holders defining the relevant product market is exceptionally substantial. For example, if the market is defined with narrow terms, the dominance may occur more easily and thus set the IPR holder under the application of Article 102 TFEU. In addition, the narrow market definition may have an effect on how the IPRs are treated when evaluating the dominance.<sup>179</sup>

#### 4.5. Article 102 TFEU

As stated previously, trademarks grant an exclusive right for the trademark holder. Even though, IPRs in general provides incentives; the exclusivity may hinder competition. Exclusivity may be argued to be seen problematic in the light of the EU competition policy. Thus, it is necessary to give a further introduction on Articles 102 and 101 TFEU. However, it is notable to understand that in order to apply Article 102 TFEU for the IPR holder, IPR holder must have found to take over a dominant position in a certain market.

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<sup>177</sup> Commission Notice on the definition of relevant market, pp. 5–6.

<sup>178</sup> 'Miten määräävä markkina-asema todetaan?' *Kilpailu- ja kuluttajavirasto* (18 May 2014) available at <[www.kkv.fi/Tietoa-ja-ohjeita/kilpailuasemat/kilpailunrajoitukset/maaraavan-markkina-aseman-vaarinkaytto/miten-maaraava-markkina-asema-todetaan/](http://www.kkv.fi/Tietoa-ja-ohjeita/kilpailuasemat/kilpailunrajoitukset/maaraavan-markkina-aseman-vaarinkaytto/miten-maaraava-markkina-asema-todetaan/)> (accessed 28 September 2018).

<sup>179</sup> Anderman – Schmidt 2011, p. 36.

The certain market may be the whole common market or just a part of it. An exclusive right for exploitation does not inevitably lead in the existence of dominance.<sup>180</sup>

Article 102 TFEU considers the abuse of a dominant position. In the EU competition law, the aim of the prohibition of abuse of dominant position is to prevent situations where companies under dominant position are abusing their position and create distortions on competition, which have an impact on intra-EU trade<sup>181</sup>. The EU competition law has set significant penalties on abuse of a dominant position<sup>182,183</sup>. To mention, the provision does not prohibit dominant position itself but abusive behaviour in certain markets where this abuse may have an impact on trade between the Member States.<sup>184</sup> The wording of Article 102 TFEU<sup>185</sup> is the following:

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between the Member States.

Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

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<sup>180</sup> Ibid, p. 35.

<sup>181</sup> In other words, trade between the Member States.

<sup>182</sup> See, for example, Commission Decision COMP/C-3/37.990, where the Commission imposed fine of 1.06 billion euros on Intel for abuse of a dominant position.

<sup>183</sup> Ojala 2011, p. 257.

<sup>184</sup> Ibid, p. 259.

<sup>185</sup> Previously, Article 82 of the Treaty of Rome as amended by the Treaty of Amsterdam and Article 86 of the Treaty of Rome.

The relevant point when evaluating this provision is that the company is exploiting its dominant position.<sup>186</sup> The application of this provision requires at first to evaluate whether an undertaking has a dominant position in the relevant market. Secondly, if it has been concluded the undertaking in question do have a dominant position, the next step is to evaluate whether the dominant position can be considered to consist of abusive behaviour.

#### **4.5.1. Principles When Evaluating the Dominant Position**

The dominant position concerns a position of economic strength that has the benefit of an undertaking<sup>187</sup> that empowers averting effective competition on the relevant market allowing behaving considerably independent despite the competitors, customers and consumers.<sup>188</sup> Dominant position's presence is acquired by various factors that are taken into consideration but are not certainly conclusive.<sup>189</sup> Thus, in order to define undertaking's dominant position, several factors are considered and how they are affecting in the relevant market. The evaluation of the dominant position and its abuse is primarily directed for national authority<sup>190</sup> as all national authorities need to apply the same policies as the European Commission does. On the EU level, the relevant authority regarding competition matters is the European Commission.<sup>191</sup>

One essential factor to take into consideration is very large market shares. This is an evidence of the presence of a dominant position save in exceptional circumstances.<sup>192</sup> The position of strength can be described as follows. If an undertaking holds a very large market share for some time so that smaller competitors with smaller market shares are not able to meet the demand promptly from those who would like to separate from the undertaking in question, the strength is evident. Undertaking having this strength makes itself unavoidable for trading. This is the special character of an undertaking having a

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<sup>186</sup> Ojala 2011, p. 260.

<sup>187</sup> Terms undertaking, and company are both used as the same meaning during this thesis.

<sup>188</sup> Case 27/76 United Brands and United Brands Continentals v Commission, paragraph 65; Case 85/76 Hoffmann-La Roche v Commission, paragraph 38; Case T-201/04 Microsoft v Commission, paragraph 229.

<sup>189</sup> Case 27/76 United Brands and United Brands Continentals v Commission, paragraph 66.

<sup>190</sup> For example, in Finland the authority is the Finnish Competition and Consumer Authority.

<sup>191</sup> Wikberg 2011, pp. 100 and 107.

<sup>192</sup> Case 85/76 Hoffmann-La Roche v Commission, paragraph 41; Case T-65/98 Van den Bergh Foods v Commission, paragraph 154.

dominant position.<sup>193</sup> In situations like these, a company has at least 50% market share.<sup>194</sup> A clear indication of dominant position's presence in a relevant market is a market share between 70% and 80%.<sup>195</sup> In the light of trademarks, market shares are not necessarily easily exceeding these numerical limits. Trademark is granting exclusivity for the trademark holder; thus, theoretically, when excluding others from using the mark, market share could be relevant. However, the exclusion refers only for the use of the mark – not the product type itself.

The proportion between the dominant undertaking's and the closest competitors' market shares is significant factor take into consideration when evaluating whether or not an undertaking has a dominant position in the relevant market.<sup>196</sup> Worth to mention is that, for example, in fast-growing markets with many innovations appearing, large market shares are not always an indication of a dominant position as the markets are dynamic<sup>197</sup>, but this still does not mean that competition rules would not be applicable<sup>198</sup>.

Another relevant factor take into consideration is to evaluate if there are some constraints that may avert consumers for a change of producers or providers. Constraints may be, for example, technical or economic.<sup>199</sup> Barriers to entry or expansion in the relevant market are significant to evaluate as well. One example of such barriers is switching costs.<sup>200</sup> Referring to trademarks, barriers on the entrance in the market may arise from the effectiveness of the trademark. If the trademark is powerful, it may limit other operators' possibilities to reach the same consumers as the reputation and image have gained the loyalty of the consumers.

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<sup>193</sup> Case 85/76 Hoffmann-La Roche v Commission, paragraph 41; Case T-336/07 Telefónica SA v Commission, paragraph 149.

<sup>194</sup> Case C-62/86 AKZO v Commission, paragraph 60; Case T-340/03 France Télécom SA v Commission, paragraph 100; Case T-336/07 Telefónica SA v Commission, paragraph 150.

<sup>195</sup> Case T-30/89 Hilti v Commission, paragraph 92; Case T-336/07 Telefónica SA v Commission, paragraph 150.

<sup>196</sup> Case T-219/99 British Airways v Commission, paragraph 210.

<sup>197</sup> Case T-79/12 Cisco Systems Inc. and Messagenet SpA v Commission, paragraph 69.

<sup>198</sup> Case T-340/03 France Télécom SA v Commission, paragraphs 107-108.

<sup>199</sup> Case T-79/12 Cisco Systems Inc. and Messagenet SpA v Commission, paragraph 73.

<sup>200</sup> Commission Decision AT.39740 Google Search (Shopping), paragraph 270.



### 4.5.2. Principles When Evaluating Abuse of Dominant Position

EEA Agreement and Article 102 TFEU prohibit actions that may cause direct damage on consumers. This also includes actions that may harm consumer indirectly by their impact on effective competition.<sup>201</sup> Article 102 TFEU and Article 54<sup>202</sup> EEA Agreement prohibit both actions that tend to strengthen position<sup>203</sup> and actions that tend to broaden to separate, neighbouring market by distorting competition<sup>204</sup>. Dominant position, abusive behaviour and the effects occurred of the abuse may be in the different market. It is not essential that all factors should exist in the same market.<sup>205</sup>

Having a dominant position means that the company or companies<sup>206</sup> in question have a special responsibility to ensure its or their actions not to have harm on efficient, and undistorted competition in the common market.<sup>207</sup> ECJ has constantly stated that a system of undistorted competition is ensured only if equality of opportunity is secured between the diverse economic operators.<sup>208</sup> Special responsibility's scope of the dominant

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<sup>201</sup> Case C-286/13 P, *Dole Food and Dole Fresh Fruit Europe v Commission*, paragraph 125.

<sup>202</sup> Article 54 EEA Agreement:

Any abuse by one or more undertakings of a dominant position within the territory covered by this Agreement or in a substantial part of it shall be prohibited as incompatible with the functioning of this Agreement in so far as it may affect trade between Contracting Parties.

Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

<sup>203</sup> Case 6/72 *Europemballage Corporation and Continental Can Company Inc. v Commission*, paragraph 26; Case 85/76 *Hoffmann-La Roche v Commission*, paragraph 91; Case 322/81 *Michelin v Commission*, paragraph 57.

<sup>204</sup> Case C-333/94 P *Tetra Pak v Commission*, paragraph 25; Case T-201/04 *Microsoft v Commission*, paragraph 1344.

<sup>205</sup> Commission Decision AT.39740 *Google Search (Shopping)*, paragraph 334.

<sup>206</sup> Dominant position may also be jointly, together with several companies. Companies jointly having a dominant position requires that companies are separate legal entities from each other, see Joined Cases C-395/96 P and C-396/96 P *Campagne Maritime Belge Transports and Others v Commission*, paragraph 36.

<sup>207</sup> Case 322/81 *Michelin v Commission*, paragraph 57; Case C-209/10 *Post Danmark*, paragraph 23; Case C-457/10 P *AstraZeneca v Commission*, paragraph 134; Case T-286/09 *Intel v Commission*, paragraph 205; Case C-202/07 P *France Télécom v Commission*, paragraph 105.

<sup>208</sup> Commission Decision AT.39740 *Google Search (Shopping)*, paragraph 331; Case C 280/08 P *Deutsche Telecom v Commission*, paragraph 230; Case T-336/07 *Telefónica SA v Commission*, paragraph 204.

undertaking is analysed in light of circumstances in question.<sup>209</sup> The idea of abuse is an objective concept referring to behaviour that influences on market structure. When abuse is present, it leads to weakened competition by using measures that differ from normal conditions of competition. Abuse hinders the degree of existence of competition or the growth of competition.<sup>210</sup> Trademarks operate similarly in this as described in Chapter 4.5.1. Trademark needs to have an impact in the market structure in order to be held abuse. How trademarks can affect in the market, this is evaluated further in Chapter 5.

### 4.5.3. Abusive Behaviour

Even though Article 102 TFEU and Article 54 EEA Agreement have lists of abusive actions, these lists are not exhaustive.<sup>211</sup> When evaluating if an undertaking has abused its dominant position, it is significant to take into consideration all circumstances and analyse whether actions are, for example, a barrier for other competitors entering in the market, dissimilar depending on transactions with other parties placing them disadvantageous competition position or strengthen the dominant position by altering competition.<sup>212</sup> A company in a dominant position must avoid certain conduct that would be acceptable to adopt for companies in a non-dominant position.<sup>213</sup> For example, if a trademark holder is in a dominant position it needs to consider its actions in the market carefully that these do not lead to abusive behaviour. ECJ has stated that the effects are relevant, regardless of the means and procedures.<sup>214</sup> The Commission has no obligation to confirm that the abusive intent exists regarding the company's dominant position. Even though the intent is not an inevitable precondition to reveal an abuse, it is one of the

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<sup>209</sup> Case C-333/94 P *Tetra Pak v Commission*, paragraph 24; Joined Cases C-395/96 and C-396/96 P *Compagnie Maritime Belge Transports and Others v Commission*, paragraph 114; Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB*, paragraph 84.

<sup>210</sup> Case 85/76 *Hoffmann-La Roche v Commission*, paragraph 91; Case 322/81 *Michelin v Commission*, paragraphs 57 and 70; Case C-62/86 A v *Commission*, paragraph 69; Case T-219/99 *British Airways v Commission*, paragraph 66; Case C-202/07 P *France Télécom v Commission*, paragraph 104; Case C-280/08 P *Deutsche Telekom v Commission*, paragraph 173; Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB*, paragraph 27.

<sup>211</sup> Case 6/72 *Europemballage and Continental Can v Commission*, paragraph 26; Case C- 280/08 P *Deutsche Telekom v Commission*, paragraph 173; Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB*, paragraph 26.

<sup>212</sup> Case C-280/08 P *Deutsche Telekom v Commission*, paragraph 175.

<sup>213</sup> Case 322/81 *Michelin v Commission*, paragraph 57.

<sup>214</sup> Case 6/72 *Europemballage and Continental Can v Commission*, paragraphs 27 and 29.

criteria, which can be used when evaluating whether the behaviour is abusive or not under Article 102 TFEU.<sup>215</sup>

Behaviour prohibited in Article 102 TFEU and Article 54 EEA Agreement, may occur as well in situations where the conduct of the dominant undertaking can impede the access in relevant market for competitors and thus disturb competition structure in the market.<sup>216</sup> Customers and users should have the possibility to have an advantage in competition's all areas, and thus competitors are able to compete in all areas of the market not just part of it.<sup>217</sup> Thus, a company in a dominant position cannot be ground for abusive behaviour in a specific market segment because its competitors may freely compete in other market segments.<sup>218</sup> A company in a dominant position may provide arguments on its behaviour that may be under Article 102 TFEU and Article 54 EEA Agreement. It may point the purpose is objectively essential or exclusionary impact may be balanced with even greater benefits for efficiency than benefits for consumers.<sup>219</sup>

The lists of abusive actions include the following examples of the abuse of a dominant position: excessive pricing, refusal to deal, predatory pricing, price and other discrimination, discount systems, tying and bundling, exclusive dealing and essential facility.<sup>220</sup> However, in the light of trademarks, the most relevant abusive action can be considered to be excessive pricing. Thus, other abusive actions are not any further explained, as their relevance regarding trademarks does not meet as well as excessive prices.

Excessive pricing refers to a situation where prices might be either too low or high. The characteristics for excessive pricing are that the separation of prices and the actual costs are not a direct result of any particular product appreciated by the consumer. Thus, it is necessary to sort out if the economic value is in accordance with the price charged from the market by the company in a dominant position.<sup>221</sup> In relation to IPRs, the issue is to

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<sup>215</sup> Case C-549/10 P *Tomra Systems and Others v Commission*, paragraphs 19–22.

<sup>216</sup> Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB*, paragraph 63; Case T- 286/09 *Intel v Commission*, paragraphs 88, 149 and 201.

<sup>217</sup> Case C-549/10 P *Tomra Systems and Others v Commission*, paragraph 42; Case T- 286/09 *Intel v Commission*, paragraphs 117 and 132.

<sup>218</sup> Case T-286/09 *Intel v Commission*, paragraph 132.

<sup>219</sup> Case C-209/10 *Post Danmark*, paragraphs 40-41.

<sup>220</sup> See more about abusive behaviour, for example, Wikberg 2011, pp. 266–309.

<sup>221</sup> Wikberg 2011, p. 301. See also Case 27/76 *United Brands and United Brands Continental v Commission*.

define the fair price for the IPR in the market. However, the great question is that whether the IPR holder is justified for a reward on creating the IPR.<sup>222</sup> The dilemma is that what price is held abusive.<sup>223</sup>

#### 4.6. Article 101 TFEU

Article 101 TFEU aim is to protect competition occurring in the market in order to improve consumers' welfare and ensure the efficient allocation of resources.<sup>224</sup> Worth to mention is that Articles 101 and 102 TFEU are targeting the same goal in different levels – maintaining efficient competition in the common market.<sup>225</sup> The Article 101(1) TFEU prohibits actions restricting competition on companies operating on the same or different level of production<sup>226</sup>. Article 101 TFEU considers restrictions imposed on competition, such may be formed for example by agreements. In the light of IPRs, exclusive rights may not have as theoretically direct tension with Article 101 TFEU as with Article 102 TFEU. Instead, the tension is often notable as a part of an agreement between two or more parties. As companies are often protecting their brand's value, IPR protection plays a significant role in this. Intellectual property rights, in general, are merely held as a legal status granted if it is out of the application of Article 101 TFEU. However, IPR holders may as well fall within the scope of Article 101 TFEU.<sup>227</sup> The wording of Article 101 TFEU<sup>228</sup> is the following:

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between the Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

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<sup>222</sup> Anderman – Schmidt 2011, p. 144.

<sup>223</sup> Whish – Bailey 2015, p. 762.

<sup>224</sup> Guidelines on the Application of Article 81(3), paragraph 13.

<sup>225</sup> Case 6/72 Europemballage and Continental Can v Commission, paragraph 25.

<sup>226</sup> Wording different level refers to both vertical and horizontal level.

<sup>227</sup> Turner 2010, p. 39.

<sup>228</sup> Previously Article 81 of the Treaty of Rome as amended by the Treaty of Amsterdam and Article 85 of Treaty of Rome.

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

— any agreement or category of agreements between undertakings,

— any decision or category of decisions by associations of undertakings,

— any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

This Article has a specific structure on how it applies or not. The structure of Article 101 TFEU is that if an agreement or decision falls within the scope of Article 101(1) and is not applicable to Article 101(3), it shall be automatically void according to Article

101(2).<sup>229</sup> This is something that authorities, national or international, need to bear in mind when evaluating if an agreement falls within the scope of Article 101 TFEU. Established practice is that restraints of practices are in the scope of Article 101(1) if the following criteria fulfil the operations are under the definition of the undertaking; cooperation between undertakings; may have an impact on trade between the Member States; the meaning or consequence is restricted competition in the common market; impact is substantial.<sup>230</sup> Therefore, Article 101 TFEU is not applied to insignificant agreements as such agreements' target or effect is not to restrict competition significantly.<sup>231</sup> As the definition is broad, case law has a significant role when determining whether operations of companies are held restrictive in the light of competition.

The definition of an undertaking is evaluated to be wide as the undertaking is considered to cover all economic activities not depending on the company form, how it is financed<sup>232</sup> or economic goal of profits.<sup>233</sup> Economic activity is considered to be all kind of activities which include offering services and goods.<sup>234</sup> It is not necessary that whether services and goods are provided for market free of charge or against payment.<sup>235</sup> Regarding the group of companies, relevant is whether the parent company can control the subsidiary.<sup>236</sup> In the light of trademarks, as economic activities may be all kinds of, it leaves room for different interpretations on how trademarks might fulfil this condition. As trademark holder has exclusive rights on the mark itself, it may use the various benefits gained from the trademark for economic purposes. For example, good reputation and image of the product that the trademark has may have a significant effect on the economic activities of the company as the company need to protect the reputation and image.<sup>237</sup>

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<sup>229</sup> Whish – Bailey 2015, p. 84.

<sup>230</sup> Ojala 2011, p. 125.

<sup>231</sup> Official Journal C 368, p. 13.

<sup>232</sup> Case C-41/90 *Höfner and Elser v Macrotron*, paragraph 21; Case C-218/00 *Cisal v INAIL*, paragraph 22.

<sup>233</sup> See, for example, Case 7/82 *GVL v Commission*. Further analysis on definition of an undertaking, see, for example, Whish – Bailey 2015, pp. 85–103.

<sup>234</sup> Case C-218/00 *Cisal v INAIL*, paragraph 23.

<sup>235</sup> Ojala 2011, p. 128.

<sup>236</sup> Case 6/72 *Europemballage Corporation and Continental Can Company Inc. v Commission*, paragraph 4.

<sup>237</sup> See, for example, Case C-230/16 *Coty Germany v Parfümerie Akzente*.

Cooperation between undertakings may be defined in various ways. Case law established has concluded that in order to fulfil Article 101(1) TFEU meaning of an agreement, it is enough that undertakings in question have disclosed joint intention to behave on markets in a particular way.<sup>238</sup> With regard to the expression of the joint intention, it is sufficient that the conditions of the agreement indicate the parties' intention to act in accordance with the conditions of the agreement.<sup>239</sup> The joint intention is relevant, and it is not necessary on what form this has been given as long as expression corresponds with the intention.<sup>240</sup> However, the principle of interpretation is that every economic operator defines *independently* policy of which it will follow in the market.<sup>241</sup> Thus, if a trademark holder requires certain actions from its cooperation party, the cooperation party decides independently whether it follows the policy or not.

Exercising IPRs may fall within the scope of Article 101 TFEU “[w]henver it is the subject, the means, or the result of a restrictive agreement or concreted practice between undertakings.”<sup>242</sup> Under the application of Article 101 TFEU might be agreements relating to registrations, assignment transfers and licenses if these agreements tend to prevent, distort or restrict competition and have an impact on the trade between the Member States.<sup>243</sup> For example, an assignment of intellectual property rights may have an impact on trade between the Member States when the supplier assigns IPRs to its distributor in order to prevent parallel imports.<sup>244</sup> In the light of trademarks, especially luxury trademarks, it is usual to use distributors – and choose them carefully. However, it is notable that as previously stated if the assignment of, for example, trademarks for the distributor is made in order to prevent parallel imports, it may fall within the scope Article 101 TFEU.

Impact on trade defines when the EU competition rules will apply. The definition is relevant in order to make the silver line between national and the EU level restrictions on

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<sup>238</sup> Case 41/69 ACF Chemiefarma v Commission, paragraph 112; Joined Cases 209-215/78 and 218/78 Van Landewyck and Others v Commission, paragraph 86; Case T-41/96 Bayer v Commission, paragraph 67.

<sup>239</sup> Case 41/69 ACF Chemiefarma v Commission, paragraph 112; Joined Cases 209-215/78 and 218/78 Van Landewyck and Others v Commission, paragraph 86; Case T-41/96 Bayer v Commission, paragraph 68.

<sup>240</sup> Case T-41/96 Bayer v Commission, paragraph 69. Further analysis on joint intention, see Whish – Bailey 2015, pp. 103–120.

<sup>241</sup> Joined Cases 40/73-48/73 etc. Suiker Unie and Others v Commission, paragraph 173. Emphasis added.

<sup>242</sup> Turner 2010, p. 40.

<sup>243</sup> Ibid.

<sup>244</sup> Ibid, p. 45.

competition.<sup>245</sup> Agreement or conduct must be likely to affect significantly on trade between the Member States.<sup>246</sup> When considering impact on trade, it is necessary to evaluate three definitions: trade between the Member States, is likely to affect and significant impact.<sup>247</sup> The definition of trade covers all cross-border economic operations including, for example, the establishment of the company<sup>248</sup> and transactions of money<sup>249</sup>. Worth to mention is that in order to fulfil the trade criteria, it is not necessary to prove that the agreement has affected significantly on trade between the Member States. Sufficient is to show that the agreement may have such impacts.<sup>250</sup> In order to be likely to effect on trade, ECJ has stated that agreement is likely to affect significantly on trade between the Member States if likely assume that it effects directly or indirectly, actually or possibly on trade between the Member States in a certain way, which may harm forming markets between the Member States.<sup>251</sup> When evaluating this, it is necessary to investigate how the real competition circumstances would be formed without such agreement.<sup>252</sup> Thus, in order trademarks and brands have an impact on trade between the Member States, even the likeliness of the impact is enough.

Article 101(1) TFEU sets out a list of operations that are considered to be restrictive in the light of competition. Although, the list is not exhaustive.<sup>253</sup> These may restrict competition either by object or by effect. The difference between these two is that the latter have an impact, for example, for prices, production, quality of products, selection of goods and market division when the first one mentioned indicates that such agreement's purpose is to restrict competition. If an agreement restricts competition by

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<sup>245</sup> See, for example, Joined Cases 56/64 and 58/64 *Consten and Grundig v Commission*; Joined Cases 6 and 7/73 *Istituto Chimioterapico Italiano and Commercial Solvents v Commission*.

<sup>246</sup> Case 22-71 *Béguelin v S.A.G.L. and Others*, paragraph 16. The criterion of area is that if an undertaking is established within the area of EU, the EU competition rules will apply (Ojala 2011, p. 151).

<sup>247</sup> Ojala 2011, pp. 140–141.

<sup>248</sup> See Case 172/80 *Züchner v Bayerische Vereinsbank*, paragraph 18; Joined Cases C-215/96 and 216/96 *Bagnasco v BPN and Carige*, paragraph 51; Case C-41/90 *Höfner and Elser v Macrotron*, paragraph 33.

<sup>249</sup> Case 172/80 *Züchner v Bayerische Vereinsbank*, paragraph 18.

<sup>250</sup> Ojala 2011, p. 142.

<sup>251</sup> Joined Cases C-215/96 and 216/96 *Bagnasco v BPN and Carige*, paragraph 47.

<sup>252</sup> See Case C-31/80 *L'Oréal NV v de Nieuwe AMCK*. However, it is necessary to understand that not all agreements have significant impact on trade between the Member States. The EU has taken this into consideration by setting *de minimis* regulation which aim is to define whether or not the agreement in question is significantly restricting competition. (See Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid.) In addition, NAAT-rule defines when there is not a question of significant impact on trade between Member States. (See Guidelines on the effect on trade concept contained in Articles 81 and 82.)

<sup>253</sup> Ojala 2011, p. 145.



object, it is not even necessary to indicate the effects separately.<sup>254</sup> An IPR holder may obviously have an impact on all these areas. A relevant factor in this thesis is the market division. As luxury trademarks have great protection even on their image and reputation, the market division is often made. In addition, certain exemptions from these restrictive agreements and actions are possible under Article 101(3) TFEU<sup>255</sup>. However, further analysis of that has been omitted from the scope of this thesis.

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<sup>254</sup> Ibid, pp. 145–146.

<sup>255</sup> 3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings;
- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

## 5. Luxury Brands' Special Position

Intellectual property rights award their owners with exclusive rights. In other words, this allows the owners to behave in a particular way, such as prohibit others from using the protected mark, sign or measures et cetera. Competition law aims to keep markets open. Thus, the tension between these two is easy to suppose.<sup>256</sup> However, even though the tension between these two legislations seem evident, multiple factors need to take into consideration. Previous Commissioner Joaquín Almunia on his speech noted a great point:

A well-functioning IPR system can in fact promote competition by encouraging firms to invest in innovation. And both competition policy and the intellectual property protection system do contribute to create the right framework for innovators.<sup>257</sup>

The antimony of these two legislations is apparent, as on the other hand the innovations are fostered by giving exclusive rights, and on the other hand maintaining freedom of access to the market.<sup>258</sup> This antimony gives for luxury brands special position in competition law, especially in excessive pricing as an abuse of a dominant position and in selective distribution.

### 5.1. Abuse of Dominant Position

#### 5.1.1. Evaluation on Dominant Position

At first, when evaluating whether a company is abusing its dominant position, it is necessary to define if the company actually is in a dominant position. In the light of intellectual property rights, the dominant position is not applied automatically on the company that owns intellectual property rights<sup>259</sup>. Thus, a company having protected trademark is not automatically held to have a dominant position in the relevant market.

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<sup>256</sup> Whish – Bailey 2015, p. 812.

<sup>257</sup> Joaquín Almunia, 'Intellectual property and competition policy' (9 September 2013) available at <europa.eu/rapid/press-release\_SPEECH-13-1042\_en.htm> (accessed 15 September 2018).

<sup>258</sup> Ghidini 2006, p. 99.

<sup>259</sup> Ojala 2011, p. 295. However, in Case T-30/89 Hilti v Commission dominant position was mainly based on the patent Hilti had and in Case T-201/04 Microsoft v Commission, ECJ concluded that Microsoft had abused its dominant position when refusing to provide necessary information which was necessary for the

Trademarks are often considered as an enabling tool. Trademarks are essential for competition because without trademarks meaningful competition would barely be attainable.<sup>260</sup> In addition, intellectual property is a significant part of the company's assets.<sup>261</sup> It may be argued that trademarks make competition more effective because the exclusive right encourages research and development on products and innovation and competition between companies. However, at the same time exclusive right restricts competition and in certain situations may lead in abuse of dominant position.<sup>262</sup>

It is noteworthy, that even if the trademark itself would not be considered as an abuse of dominant position, it may lead to a dominant position in the following circumstance. A trademark, which is well-known, may turn out to be remarkably effective that the trademark itself is the reason why the consumer chooses the product. This may create situations where the selection of products narrows down. Due to the narrowness of the product selection, the possibility of selling rival products is quite limited.<sup>263</sup>

Regarding luxury brand conglomerates, the previously stated partly seem to apply. As before described in Chapter 3.4., luxury brand conglomerate consists of a wide portfolio of products, which are divided into various product markets. For example, LVMH sells handbags and wine and spirits. It is apparent that these products are not competing in the same market. Even though, both are a part of the luxury product market, the products themselves are not similar, and thus the markets are separate – not to mention geographical market that needs their own evaluation in which the territoriality of IPRs may play a significant role.

In addition, it has been stated “[l]uxury products have a low degree of substitutability with other products falling within other segments of the same sector.”<sup>264</sup> A luxury brand that may be remarkably effective may be argued to be in the core of the luxury brand. Luxury brand's aim is to create such reputation that the reason the product is bought lays solely down on the brand. The luxury product, for example a handbag, may compete with other luxury brands' handbags in the market, but when consumer is seeking for the special

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competitor and tying application with the operating system. Thus, the principal is not always followed, and exceptions may occur as the previous cases reveal.

<sup>260</sup> Kur – Dreier 2013, p. 157.

<sup>261</sup> Innanen – Jäske 2014, p. 19.

<sup>262</sup> Ojala 2011, p. 447.

<sup>263</sup> Rissanen 1978, pp. 181–182.

<sup>264</sup> Case COMP/M.1780 – LVMH / PRADA / FENDI, paragraph 11.

handbag, the consumer may already have the image on his or her mind of the product in question – the purchase decision might be made already beforehand.

When considering whether ostensibly similar products are competing in the same market, one option is to investigate if prima facie market shares exist in the area of luxury products. For example, Louis Vuitton is under LVMH's conglomerate. Gucci is under Kering's conglomerate. Both of these luxury brand conglomerates are known of the luxury brands and both luxury brands are producing, for example, handbags. Probably, these two luxury brands are placed in the same market. However, it may be argued that these two brands in certain situations are not even competing with each other due to the image formed on consumers mind. Still, in fact, the market of luxury products is held competitive because there are numerous operators in the field of luxury products<sup>265</sup>.

Another factor to evaluate is the size of brand's market shares. Usually market share over 50% is potentially an indication about the dominant position<sup>266</sup>. Defining the relevant market share in the case of luxury brand conglomerates requires considering multiple factors. Luxury brand conglomerates consist of a wide portfolio of various product types<sup>267</sup>. As stated, the products are not necessarily competing in the same market. For example, LVMH owns various brands, such as Louis Vuitton and Hennessy. Louis Vuitton is a producer of leather goods and fashion, such as handbags and wallets, whereas Hennessy produces spirits. It is obvious that these two categories are not operating in the same product market. This is the trick with the luxury brand conglomerates. Even if an individual luxury brand conglomerate would lead the luxury product market, as LVMH does<sup>268</sup>, the market shares in product markets are fragmented as the brands' products provided are competing in different product market. For example, regarding LVMH, Louis Vuitton belongs to a business group that consists of fashion and leather goods and Hennessy belongs to wines and spirits. The revenues are usually divided in accordance

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<sup>265</sup> Case No COMP/M.1780 – LVMH / PRADA / FENDI, paragraph 10.

<sup>266</sup> Case C-62/86 AKZO v Commission, paragraph 60; Case T-340/03 France Télécom SA v Commission, paragraph 100; Case T-336/07 Telefónica SA v Commission, paragraph 150.

<sup>267</sup> Som – Blanckaert 2015, pp. 11–12.

<sup>268</sup> Danielle Wightman-Stone, 'LVMH tops Deloitte's Luxury Goods ranking' *Fashion United* (17 May 2017) available at <[fashionunited.uk/news/fashion/lvmh-tops-deloitte-s-luxury-goods-ranking/2017051724540](http://fashionunited.uk/news/fashion/lvmh-tops-deloitte-s-luxury-goods-ranking/2017051724540)> (accessed 27 October 2018). Still, LVMH should not be considered to be in a dominant position as Commission has approved its acquisitions. See, for example, Commission Decision Case M.8509 – LVMH / MARCOLIN / JV; Commission Decision Case M.7568 – M1 FASHION / LVMH / PEPE JEANS GROUP. In addition, no evidence has been indicated regarding LVMH's dominant position.

with the business groups, in other words, by category of the product<sup>269</sup>. Although, the brands are all owned by LVMH, they operate as an individual brand, and the consumers may not even know the conglomerate structure behind the brand and the trademark. However, the power of trademark is enormous when considering luxury products – logo may message the reputation of the company<sup>270</sup>.

In addition, the market for luxury products may be argued to be dynamic, though not that dynamic as for example technology industry<sup>271</sup>. That is held luxury today might be out of fashion the next week. In addition, the luxury brand conglomerates acquire new brands continuously. A great example of that is the recent acquisition made by Michael Kors. Michael Kors Holdings Limited broadened its brand catalogue by buying Versace<sup>272</sup>. In addition, Michael Kors has recently activated in the field of luxury products. Before Versace, Michael Kors acquired Jimmy Choo in 2017<sup>273</sup>. In addition, in the context of the purchase of Jimmy Choo, Michael Kors' CEO stated the purchase was not the only to be made.<sup>274</sup> As Versace was bought approximately one year after the acquisition of Jimmy Choo, it is evident that Michael Kors is aiming to growth. Thus, luxury brand conglomerates market shares' may vary from time to time – and the case Michael Kors proves it.

Whether luxury brand conglomerate can be considered to be in a dominant position due to the wide brand portfolio may be challenged as well from the perspective of trademarks. As in case *Grammophon*<sup>275</sup>, ECJ stated that IPRs exhausts when the products are set into circulations on the common market, it is relevant to bear this is mind. Even though, trademarks do give exclusive right for the holder, the right exhausts right after the product has put on circulation in the market. Thus, the exclusive right does not last forever.

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<sup>269</sup> LVMH for Investors, available at <[www.lvmh.com/investors/](http://www.lvmh.com/investors/)> (accessed 3 October 2018).

<sup>270</sup> Abigail Rubinstein, '7 Reasons Why Trademarks Are Important to Your Business' *Entrepreneur Europe* (24 July 2014) available at <[www.entrepreneur.com/article/235887#](http://www.entrepreneur.com/article/235887#)> (accessed 27 October 2018).

<sup>271</sup> For example, certain markets are fast-growing markets innovations are emerging and thus large market shares are not always an indication of a dominant position. See Case T-79/12 *Cisco Systems Inc. and Messagenet SpA v Commission*, paragraph 69.

<sup>272</sup> See more Kim Bhasin and Robert Williams, 'Michael Kors Buys Fashion Label Versace for \$2.2 Billion' *Bloomberg* (25 September 2018) available at <[www.bloomberg.com/news/articles/2018-09-25/michael-kors-buys-high-fashion-label-versace-for-2-2-billion](http://www.bloomberg.com/news/articles/2018-09-25/michael-kors-buys-high-fashion-label-versace-for-2-2-billion)> (accessed 27 September 2018).

<sup>273</sup> Lauren Thomas and Courtney Reagan, 'This will not be the last acquisition,' Michael Kors' CEO says after Jimmy Choo deal' *CNBC* (25 July 2017) available at <[www.cnbc.com/2017/07/25/this-will-not-be-the-last-acquisition-michael-kors-ceo-says-after-jimmy-choo-deal.html](http://www.cnbc.com/2017/07/25/this-will-not-be-the-last-acquisition-michael-kors-ceo-says-after-jimmy-choo-deal.html)> (accessed 27 October 2018).

<sup>274</sup> *Ibid.*

<sup>275</sup> Case 78/70 *Deutsche Grammophon v Metro GmbH*.

However, in order the luxury trademark to exhaust, the consent of the trademark holder is needed.

If a luxury corporation would be held to have a dominant position despite the ambiguity matters discussed above, certain responsibilities will arise from that. In the case Google Search (Shopping)<sup>276</sup>, Commission stated that proper competition is ensured when all market operators have similar opportunities. Thus, if an operator has a dominant position, it has certain criteria on how to not behave in the market. Reflecting this to luxury brand conglomerates, exclusive right for a trademark as such does not create any special action that conglomerates need to refrain from, as IPRs in general are not held automatically to create a dominant position<sup>277</sup>. Michael Kors' acquisitions, discussed previously, indicate that luxury markets are actually quite open for various operators. In order to all operators in the luxury market to have the same possibilities, luxury corporation in a dominant position need to behave carefully in the market. Nevertheless, the luxury market is held competitive<sup>278</sup>.

In sum, luxury brand conglomerates seem to fit perfectly on a dominant position when considering only the wide brand portfolio. However, when looking further the structure of luxury brand conglomerate it is evident that certain circumstances exempt it from the presumption of application dominant position. The structure of luxury brand conglomerate, exclusive right for trademark and the relevant market do not meet each other. In theory, the luxury brand conglomerate would fit under the application of Article 102 TFEU perfectly. However, it is necessary to highlight that trademarks are used rather as a tool for commercial and communicational purposes than excluding other competitors from the market.

### **5.1.2. Abuse of Dominant Position: Excessive Pricing**

The pricing of luxury products differs from the pricing of regular products. Consumers are willing to pay significantly high prices of the luxury products. In fact, when luxury products' prices grow so does the demand. Thus, this is a vice versa situation when considering regular pricing models where demand usually diminishes when the prices are

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<sup>276</sup> Commission Decision AT.39740 Google Search (Shopping).

<sup>277</sup> Ojala 2011, p. 295.

<sup>278</sup> Case No COMP/M.1780 – LVMH / PRADA / FENDI, paragraph 10.

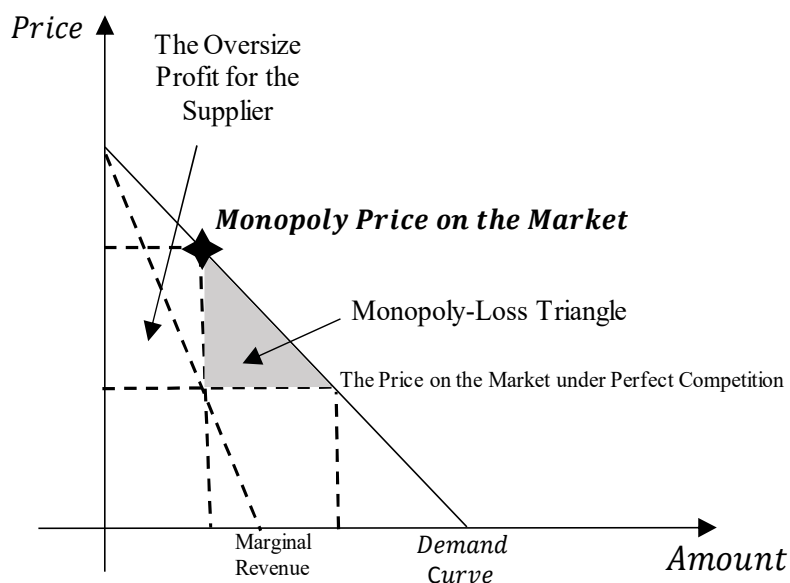
increasing. Aspirational value exceeds the price.<sup>279</sup> However, at the same time Article 102 TFEU has prohibited excessive pricing. Therefore, it can be questioned how excessive prices are allowed even though those might seem to be under the application of Article 102 TFEU.

As luxury products are usually ‘trademarked’, we can look into this subject in the light of trademarks. Trademark holder may have an impact on the prices as follows. The holder of the trademark may exclude other operators from using the same mark. As already previously stated, the exclusive right may enable to gain certain value only for the trademark holder itself. This may lead into situations where trademark holder restricts the prices on a certain level; this can be called as monopoly prices. Monopoly prices can be created when having a right to exclude other operators from the markets. However, this may also have a positive and direct impact on innovations. If there were no incentives for innovations, people would wait others’ innovations appearing in the market and then take advantage of those. A successful protection of trademark may allow the trademark holder to set prices above the competitive level as exclusive right gives an opportunity to exclude competitors using the mark. At the same time, the trademark holder may restrict producing. Even though monopoly prices reward the IPR holder, it does have some costs.<sup>280</sup> In the case of luxury products, for example luxury handbags, the society loses value when luxury product corporations charge a price for handbags that exceed the production costs.

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<sup>279</sup> Som – Blanckaert 2015, p. 150.

<sup>280</sup> O’Donoghue – Padilla 2013, pp. 519–521.



*Figure 9.* How monopoly prices are formed and how the loss for society occurs. The monopoly-loss triangle presents what is the value that society does not get due to the limited production of the monopolist company. The oversize profit presents the benefit the company gains by charging high prices.

ECJ established in Case 27/76 *United Brands v Commission* that excessive price is “[a] price which is because it has no reasonable relation to the economic value of the product supplied.”<sup>281</sup> The difficulty with this so-called test is that what is the factor of the price that is held abusive as it is not related to the product’s economic value. Thus, how it is defined when the price becomes excessive. Certain methodologies have been presented on how prices could be identified to be excessive, and if prices are excessive when those could be considered abusive.<sup>282</sup> For example, cost and price analysis is one method for determining the excessive price. The analysis focuses on the relation between the selling price and the costs of production. If the price is not related to the economic value, it is considered excessive.<sup>283</sup> However, at the same time, the difficulty in the division of the costs have recognised.<sup>284</sup>

<sup>281</sup> Case 27/76 *United Brands and United Brands Continental v Commission*, paragraph 250.

<sup>282</sup> Whish – Bailey 2015, p. 762–763.

<sup>283</sup> See Case 27/76 *United Brands and United Brands Continental v Commission*, paragraph 251.

<sup>284</sup> Whish – Bailey 2015, p. 763.



Cost and price analysis in the case of luxury trademarks is actually quite easy to put into practice. Luxury trademark is one relevant factor in the price of the product. Luxury trademarks' usually have much higher prices comparing to products, which are not held luxury. Comparing the selling price and the production cost of the luxury product, it is evident that the margin between these two is large. Apple is a great example in this. The most expensive iPhone's, iPhone XS Max, production costs were revealed. These are estimated to be \$443<sup>285</sup>. However, the selling price is \$1099.<sup>286</sup> Thus, the remainder between these two prices is \$656, which can be held to be significant and has no a reasonable relation to the economic value if we consider only the price. In addition, if a detailed analysis of the price is not possible to make due to the lack of information of the costs, comparison of a dominant company's prices might indicate is the price excessive or not. Regarding luxury products, the comparison could be made between products that are close to each other in order to be approximate.<sup>287</sup> After a price has been evaluated to be excessive, the next step is to consider if the price is abusive, in other words, unfair. The price can be unfair for both in itself and as well when compared with products competing.<sup>288</sup> In addition, low prices might be abusive as well<sup>289</sup> – however, in the case of luxury trademark apparently this is not the case.

Even if there would be a high-profit margin between the selling price and the production costs, it still does not necessarily make the price abusive. For example, the higher price might be justified under the fact the intellectual property right holder selling the product is by charging a higher price trying to obtain and recover the costs occurred when creating the work.<sup>290</sup> Undoubtedly, the product built up with protected IPRs have some costs, and the producer has been required to make investments. Thus, it would be valid to give a right to recover the costs. However, if there are no objective criteria for a particularly high price, the high price is abusive<sup>291</sup>.

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<sup>285</sup> Joshua Swingle, 'Apple iPhone XS Max estimated production costs revealed' *Phonearena* (25 September 2018) available at <[www.phonearena.com/news/Apple-iPhone-XS-Max-component-costs-estimates\\_id109241](http://www.phonearena.com/news/Apple-iPhone-XS-Max-component-costs-estimates_id109241)> (accessed 23 October 2018).

<sup>286</sup> Apple websites, available at <[www.apple.com/shop/buy-iphone/iphone-xs](http://www.apple.com/shop/buy-iphone/iphone-xs)> (accessed 23 October 2018).

<sup>287</sup> Whish – Bailey 2015, pp. 763–764.

<sup>288</sup> *Ibid.*, p. 765.

<sup>289</sup> *Ibid.*, p. 766.

<sup>290</sup> Turner 2010, p. 100.

<sup>291</sup> *Ibid.*, p. 101.

By focusing on the price and cost analysis, it would seem that, for example, if the reasonable price were considered to be close to the actual production costs, luxury products' prices would be considered excessive. However, regarding luxury trademarks other factors need to take into consideration as well. The price is one factor of the concept of luxury. The high price is even justified among consumers due to the quality of the product<sup>292</sup>. It has been as well argued that the high price may even be a signal of luxury in cases where there is no culture behind, yet.<sup>293</sup> In fact, as in Chapter 3.5. stated, luxury brand corporations have moved forward to a model which consist of luxury products on various levels. Thus, comparing to the history of luxury products, nowadays, even more consumers do have access to the luxury-trademarked products. Thus, it is justified to argue that purely determining prices in the case of luxury trademarks is not alone satisfactory when evaluating whether the price is excessive and therefore possibly abusive as well. The price is only one factor of the special nature of the luxury product, and the brand.

Another relevant factor that I argue to have an impact on the evaluation, whether the price should be held excessive or not, is a consumer's loyalty towards the product, especially on the brand. In fact, the loyalty of the customer is usually relevant in order to spread the word of the product. After-sales is significant for gaining the consumer loyalty.<sup>294</sup> For example, Louis Vuitton provides free repair service for life. It is highly likely that such service leads to another purchase because the customer is satisfied. This might create brand loyalty, which means the customer is a long-time customer of the brand in question.<sup>295</sup> It has been argued that brand loyalty itself have more impact on customer's decision to buy the product than price.<sup>296</sup> In addition, brand loyalty would allow changes in the price of the product as brand loyal consumers are considered price sensitive.<sup>297</sup> Even though the price would be excessive, the loyal customers are still willing to purchase the product. As brand loyalty is highly common in the luxury market, it is necessary to consider this aspect as well and give emphasis on this point as the final power lays down with the customer's image outlined.

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<sup>292</sup> Kapferer – Klippert – Leproux 2014, p. 8.

<sup>293</sup> Ibid, p. 5.

<sup>294</sup> Som – Blanckaert 2015, p. 274.

<sup>295</sup> Ibid, p. 357.

<sup>296</sup> Rondán Cataluña – Navarro García – Phau 2006, p. 437.

<sup>297</sup> Krishnamurthi – Raj 1991, p. 181.

In addition to cost and price analysis and loyalty, one more factor should be highlighted. As competition law aims to both protect competition as well as boost the consumer welfare<sup>298</sup>, it is justified to look further on how the improvement of consumer welfare behaves in the light of luxury products. At the latest, when the former Commissioner Neelie Kroes stated “[c]onsumer welfare is now well established as the standard the Commission applies when assessing mergers and infringements of the Treaty rules on cartels and monopolies --”<sup>299</sup> the goal of the EU competition law was established – consumer welfare. When considering consumers and luxury products together, it is justified to raise the question of whether necessity product would be under stricter protection than products, which are not necessary for consumers.

I claim that if the product with a luxury trademark were held as a necessity product, excessive pricing regarding this product would be intervened more often in the light of consumer welfare. A great example is pharmaceutical products. By monopoly, and thus excessive prices, society loses value when “[p]harmaceutical companies charge prices for pills that far exceed of the cost of manufacturing those pills.”<sup>300</sup> Apparently, comparing to luxury corporations, the pharmaceutical companies have different position towards consumers – medicines are essential for consumers whereas luxury handbags are not. Mostly, the luxury products in the market are the type the need is created artificially. As described in Chapter 3.5., the luxury products function has moved towards the pyramid structure of the products. Thus, more luxury products are available for consumers – on a large price scale. This promotes an idea of luxury that has a basis on the consumer’s wealth, status and image and not necessarily on the high quality of the product – still it is not entitled to special legal protection<sup>301</sup>. I argue this transformation still does not lead into a situation where these would be considered necessity products. In fact, luxury products are made more available for consumers that are willing to pay in a different value but still luxury products. Therefore, the nature of necessity product should be taken into consideration when evaluating the prices of luxury products.

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<sup>298</sup> See Chapter 4.1.

<sup>299</sup> Neelie Kroes, ‘Preliminary Thoughts on Policy Review of Article 82’ (23 September 2005) available at <[ec.europa.eu/competition/speeches/index\\_2005.html](http://ec.europa.eu/competition/speeches/index_2005.html)> (accessed 21 October 2018).

<sup>300</sup> O’Donoghue – Padilla 2013, p. 521.

<sup>301</sup> Calboli 2015, p. 54.

## 5.2. Selective Distribution

Intellectual property right holders are usually companies, and the distribution of the products is agreed with a separate contract. Although, trademark legislation grants an exclusive right for the use of the trademark this will not lead into a situation where competition legislation would not be applicable regarding the intellectual property right.<sup>302</sup> Selective distribution is one method on how vertical agreements may be formed. Such vertical agreements belong to vertical restraints on competition. Vertical restraints operate on different portals of the distribution chain. Thus, the selective distribution may fall within Article 101(1) TFEU. Commission has set out guidelines on how to interpret vertical restraints in general<sup>303</sup>.



*Figure 10.* How selective distribution's chain is structured.

Selective distribution agreements are common especially in the area of branded products<sup>304</sup>. Selective distribution means that a manufacturer decides among the prospective retailers those of which the manufacturer desires to start a business relation. The nature of selective distribution is that for the retailer accepted is imposed a duty not to supply products for retailers who are not belonging to the distribution network. The aim is to protect the distribution network tightness. The manufacturer of the product may limit the number of retailers operating in the same area in order to guarantee sufficient sale for each retailer.<sup>305</sup>

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<sup>302</sup> Ojala 2011, p. 446.

<sup>303</sup> See Vertical Guidelines.

<sup>304</sup> Which – Bailey 2015, p. 680.

<sup>305</sup> Kuoppamäki 2012, p. 195.

Selective distribution is common when selling branded products, such as perfumes, cosmetics and design fashion. With the decoration of the boutiques and the quality of the environment, it is wanted to emphasise the status of the product in the eyes of the consumers. Selectivity is argued to protect the value and image gained by marketing. Usually, selectivity weakens the price competition between retailers but may increase the efficiency of the quality competition.<sup>306</sup>

However, the Vertical Guidelines state that competition risks may be a decrease of intra-brand competition<sup>307</sup>, exclude access to the market and the facilitation of anti-competitive cooperation between the providers and buyers.<sup>308</sup> The key factor to take into consideration when evaluating if selective distribution agreement falls within the scope of Article 101(1) TFEU is to distinct ‘purely qualitative’ system and ‘quantitative’ system. The former does not infringe Article 101(1) TFEU, although it may include other restrictions, which are prohibited under Article 101(1) TFEU.<sup>309</sup>

### **5.2.1. Circumstances before Coty**

A significant cornerstone regarding luxury goods, and thus brands as well was ECJ’s conclusion in case *Coty Germany v Parfümerie Akzente*<sup>310</sup>. In this case, the evaluation made by ECJ was a matter of interpretation of Article 101(1) TFEU and Article 4(b) and (c) of Block Exemption Regulation<sup>311</sup>. More specifically, the case was about selective distribution. ECJ concluded that the supplier of luxury goods can ban its authorised distributors from selling goods in question through an internet platform owned by a third party if individual criteria are fulfilled. The conclusion was significant because clear legal uncertainty appeared in this field.

The *Coty* case gave congruent direction on how to evaluate selective distribution, even though the conclusion also has faced criticism. It is necessary to understand the chain and

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<sup>306</sup> Ibid.

<sup>307</sup> Intra-brand competition refers to situation where competition occurs between distributors or retailers of the same branded product (Glossary of terms used in EU competition policy 2002, p. 28.)

<sup>308</sup> Vertical Guidelines, paragraph 175.

<sup>309</sup> Whish – Bailey 2015, p. 680. See more on Vertical Guidelines, paragraph 175.

<sup>310</sup> Case C-230/16 *Coty Germany v Parfümerie Akzente*.

<sup>311</sup> Commission Regulation (EU) No 330/2010 of 20 April 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.

context of the cases behind Coty and how these conflicted with each other. The first relevant case regarding this field was *Metro v Commission*<sup>312</sup>. Regarding selective distribution, ECJ concluded in case *Metro v Commission* that in order selective distribution system to be purely qualitative, and thus out of the scope of Article 101(1) TFEU, three criteria must be fulfilled. In addition, the criteria are cumulative. At first, the product type justifies the manufacturer to limit the sales points by which the products may be retailed. In practice, this means in the light of luxury brands, that selective distribution may be justified when it is empowering the image of a brand and thus empowering the inter-brand competition<sup>313</sup>. Secondly, the criteria on how the manufacturer chooses the retailer are purely qualitative in nature. The criteria are uniform and non-discriminatory for all potential retailers. Basically, every potential retailer who fulfils the imposed criteria should be able to obtain the products because there is not quantitative limitation. Thirdly, restrictions are not going any further than it is objectively necessary to protect the quality of the product. This refers to restrictions, which are imposed on the authorised distributor. This criterion is mostly evaluated by case-by-case analysis<sup>314</sup>. ECJ concluded that in *Metro v Commission* case there were no hard-core restrictions present.<sup>315</sup>

The second relevant case of ECJ was the case *Pierre Fabre Dermo-Cosmétique SAS*<sup>316</sup>. The case handled selective distribution as well, but it concluded divergently from ECJ's case *Metro v Commission*. In this case, ECJ concluded that there was a hard-core restraint present when internet sales were banned. ECJ observed that it was not legitimate to have competitive restrictions when aiming a prestigious image<sup>317</sup>. In the light of case *Metro v Commission*, it is apparent that these two cases differ from each other and leads to legal uncertainty. At first, protection of quality and image is acknowledged and afterwards not.

On May 2015, European Commission published Digital Single Market strategy, and due to that, it published later on Final Report on the E-commerce Sector Inquiry<sup>318</sup>. In the report, it has stated that there is no need for change regarding qualitative and quantitative

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<sup>312</sup> Case 26/76 *Metro v Commission*.

<sup>313</sup> Inter-brand competition refers to situation where firms have, in order to distinguish their products from other brands and labels in the same market, formed brands and labels for their goods (Glossary of terms used in EU competition policy 2002, p. 26.)

<sup>314</sup> See, for example, Case C-439/09 *Pierre Fabre Dermo-Cosmétique SAS*, paragraphs 42–46.

<sup>315</sup> Whish – Bailey 2015, pp. 680–682.

<sup>316</sup> Case C-439/09 *Pierre Fabre Dermo-Cosmétique SAS*.

<sup>317</sup> *Ibid*, paragraph 46.

<sup>318</sup> European Commission's Final report on the E-commerce Sector Inquiry.

selective distribution systems.<sup>319</sup> The report concluded clearly that within the meaning of the EU competition rules, platform bans are not held as hard-core restrictions<sup>320</sup> because marketplace bans do not necessarily prohibit selling online.<sup>321</sup> Thus, reflecting to ECJ's case *Pierre Fabre Dermo-Cosmétique SAS*, legal uncertainty continued.

### 5.2.2. Case Coty

Third party online platforms for selling products are seen incompatible with luxury brands desired selective distribution model of the products. Thus, luxury brands have tried to adjust the qualitative distribution with competition laws as until now they have counted on Vertical Guidelines<sup>322</sup>. Luxury brands have claimed that branding occurring in a third party online platform would abate the luxury image of their products.<sup>323</sup>

After these various circumstances, legal certainty was obtained by the conclusion of the case *Coty*. *Coty*, a leading German supplier of luxury cosmetics, distributes its luxury goods within Europe via selective distribution system. The network for selective distribution is under consistent terms of distribution. This means the same terms are imposed for every distributor. Requirements for authorised distributors imposed by *Coty* are that they need to meet certain qualitative criteria. One of these is that distributors are authorised to sell products only through an “electronic shop window” of the authorised store. This means that distributors have no right to sell the products through online platforms such as eBay or Amazon because the third party is not authorised to retail *Coty*'s products. In order to maintain the image of *Coty*'s products, qualitative requirements relate, for example, to furnishing and décor. *Parfümerie Akzente* refused to comply with the requirements *Coty* had imposed on the distributors and later on, the German court concluded that a hard-core restriction existed. ECJ needed to answer to the following questions regarding selective distribution that are relevant in this context:

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<sup>319</sup> *Ibid*, paragraph 251.

<sup>320</sup> *Ibid*, paragraphs 41–42.

<sup>321</sup> European Commission's Final report on the E-commerce Sector Inquiry, paragraph 466.

<sup>322</sup> Vertical Guidelines, paragraph 54: “[w]here the distributor's website is hosted by a third party platform, the supplier may require that customers do not visit the distributor's website through a site carrying the name or logo of the third party platform.”

<sup>323</sup> ‘The *Coty* Case – The CJEU rules in favour of selective distribution networks against third-party online platforms’ *Dentons* (7 December 2017) available at <[www.dentons.com/en/insights/alerts/2017/december/7/the-coty-case](http://www.dentons.com/en/insights/alerts/2017/december/7/the-coty-case)> (accessed 28 October 2018).

- 1) Do selective distribution systems that have as their aim the distribution of luxury goods and primarily serve to ensure a “luxury image” for the goods constitute an aspect of competition that is compatible with Article 101(1) TFEU?
- 2) Does it constitute an aspect of competition that is compatible with Article 101(1) TFEU if the members of a selective distribution system operating at the retail level of trade are prohibited generally from engaging third-party undertakings discernible to the public to handle internet sales, irrespective of whether the manufacturer’s legitimate quality standards are contravened in the specific case?<sup>324</sup>

Advocate General Wahl stated in his Opinion<sup>325</sup> that ECJ’s case *Metro v Commission* criteria are fulfilled because the aim is to maintain a luxury image. Thus, it is compatible with Article 101(1) TFEU.<sup>326</sup> In addition, Wahl stated that such platform bans as it is now question could not be compared to the ban that is absolute.<sup>327</sup> ECJ followed Advocate General Wahl’s opinion.

ECJ concluded in *Coty Germany v Parfümerie Akzente* that the case *Pierre Fabre* was not intended to amend the previous case law of selective distribution systems.<sup>328</sup> Furthermore, ECJ cited its previous case law *Copad v Christian Dior*<sup>329</sup> where ECJ had stated that the luxury aura is much more than material characteristics.<sup>330</sup> The restriction imposed by Coty was held appropriate because the aim was to protect the luxury image of the products<sup>331</sup> and the criteria established in *Metro v Commission* were fulfilled. In addition, when third party online platform sales is prohibited, luxury brands’ are easier to administer the way in which the products are sold – it is an essential element regarding selective distribution<sup>332</sup>. Furthermore, ECJ concluded that imposing a platform ban was not held as a hard-core restriction because it was restricting only one form of sale.<sup>333</sup> In the end, the conclusion, in this case, was warmly welcomed as it clarified the legal

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<sup>324</sup> Case C-230/16 *Coty Germany v Parfümerie Akzente*, paragraph 20.

<sup>325</sup> Opinion of Advocate General, on 26 July 2017.

<sup>326</sup> *Ibid*, paragraph 91.

<sup>327</sup> *Ibid*, paragraph 149.

<sup>328</sup> Case C-230/16 *Coty Germany v Parfümerie Akzente*, paragraph 35.

<sup>329</sup> Case C-59/08 *Copad v Christian Dior*.

<sup>330</sup> *Ibid*, paragraph 24.

<sup>331</sup> Case C-230/16 *Coty Germany v Parfümerie Akzente*, paragraph 51.

<sup>332</sup> ‘The Coty Case – The CJEU rules in favour of selective distribution networks against third-party online platforms’ *Dentons* (7 December 2017) available at [www.dentons.com/en/insights/alerts/2017/december/7/the-coty-case](http://www.dentons.com/en/insights/alerts/2017/december/7/the-coty-case) (accessed 28 October 2018).

<sup>333</sup> Case C-230/16 *Coty Germany v Parfümerie Akzente*, paragraph 68.



uncertainty with the previous case law regarding selective distribution, especially in the light of luxury brands.

### 5.2.3. Coty's Relevance Regarding Luxury Brands

Coty was a significant milestone for luxury brands. As in previous chapter presented, legal uncertainty dominated in selective distribution and questions had been raised various times regarding luxury products' selective distribution system. As early as in case *Metro v Commission* it was noted that selective distribution is allowed when the three criteria are fulfilled. Thus, selective distribution is justified when potential distributors are chosen objectively and non-discriminatory and it is necessary to protect the product's luxury quality and image of the brand. This highlights the fact that luxury products and brands have been truly acknowledged. The aura of luxury is acknowledged to be preserved, and thus having special treatment compared to other 'regular' products. Thus, the case Coty apparently improved the protection of both luxury products and brands.

Generally, the selective distribution would fall within the scope of Article 101(1) TFEU. However, special arrangements are created in the light of luxury products. It has been stated in several cases, as previously presented, that luxury products selective distribution system falls *out* of the scope of Article 101(1) TFEU if the three cumulative criteria are fulfilled<sup>334</sup>. The criteria are favourable for luxury brands due to the luxury product's nature. Thus, it is clear that luxury brands have a special position regarding selective distribution as such arrangement has been established which is clearly benefitting luxury products, and thus luxury brands as well.

As the three cumulative criteria are qualitative, it is clearly beneficial as well in the light of luxury products and brands. Luxury products and especially luxury brands are focusing on quality instead of amount. The highest quality is used in order to create a luxury image. However, the quality is only one factor when creating a luxury image of a product. Still, compared to other products, luxury products' selective distribution systems are exempted from the application of Article 101(1) TFEU. Even though, 'regular' products may also be exempted from these if they can fulfil the three criteria, it can be argued to be much

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<sup>334</sup> Referring to the criteria set out in Case 26/76 *Metro v Commission*.

harder to give grounds for on behalf of a product, which is not held luxury in the market.<sup>335</sup>

ECJ concluded in the case *Coty* that platform bans are not held as hard-core restrictions. This conclusion was favourable when considering luxury brands as well. As the aim is to create a certain image of the product in the market, it requires careful decisions on every factor of which the brand is consisting of. The decisions may focus, for example, on choosing the place where to sell the products thereby the image of an excellent quality product remains. Thus, the owner of the luxury brand needs to have the possibility of affecting what to allow and what not. If a platform is not fulfilling the internal policies of the luxury brand, it should be possible to reject that distribution option. Competition law does not see it that way in general. Thus, ECJ's conclusion can be argued to be very warmly welcomed by the luxury brand owners.

To mention, case law has recognised luxury products different position in the market by providing such special arrangement on these. The arousing debate may be expected in the other product categories than luxury products as the aligned approach is concerning just luxury products.<sup>336</sup> It can be argued that other than luxury products are set in a different position, which in particular might be held discriminatory. It can be questioned whether luxury products are held to be more important than the others are.

However, it is necessary to take into consideration where does the limit go when the selective distribution is held to be justifiable in the light of luxury brands. Extensive protection may lead to circumstances where luxury brands prevail. However, *Coty*'s conclusion encourages companies that have had on their mind whether selective distribution would be an option on selling their products, to consider precisely designed system for luxury products<sup>337</sup>.

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<sup>335</sup> However, noteworthy is to mention, that a single company, which have under 30% market share on the relevant markets, may use selective distribution system without falling into the scope of Article 101(1) TFEU. See more on Vertical Guidelines, paragraph 178.

<sup>336</sup> Cicala – Haegman – Cuff 2017 , p. 108.

<sup>337</sup> Jacques-Philippe Gunther, Susanne Zuehlke, Mathilde Ayel, Francesca Gentile and Philipp Heuser, 'What Dies the *Coty* Judgement of the European Court of Justice Mean for Companies?' *Willkie Farr & Gallagher LLP* (13 December 2017) available at <[www.willkie.com/~media/Files/Publications/2017/12/What\\_Does\\_the\\_European\\_Court\\_of\\_Justices\\_Coty\\_Judgment\\_Mean\\_for\\_Companies.pdf](http://www.willkie.com/~media/Files/Publications/2017/12/What_Does_the_European_Court_of_Justices_Coty_Judgment_Mean_for_Companies.pdf)> (accessed 28 October 2018), p. 4.

It may be argued that luxury brands should not obtain limitless protection in the light of the cases presented previously. Even though, it is justified to render selective distribution system for luxury products without falling into the scope of Article 101(1) TFEU, it is noteworthy to speculate that who is the party to evaluate whether a product is held luxury or not? It has been noticed that there is a need of strong focus on the evaluation whether the product may be qualified as luxury good<sup>338</sup>. As previously presented in Chapter 3.1.2, luxury may mean different kinds of things, depending on the consumer itself. Even though, the Coty case did clarify previous case law, it still may raise some questions. I believe the debate is still not over.

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<sup>338</sup> Ibid.

## 6. Conclusions

Trademark is granting the exclusive right for its holder whereas competition law is aiming to free competition. The antimony of these two is clear. Still, the relationship between these two is needed to look further. It is evident that luxury trademarks and brands have a different position regarding competition law, especially in excessive pricing and selective distribution. Whether trademark is allowing abuse of a dominant position in the case of luxury brands, the answer is submitting on the negative side. The grounds for negative answer rest on multiple factors. Luxury brand conglomerates have a wide portfolio on products sold. Even though, ECJ has stated that luxury products have a low degree of substitutability it has noted as well that luxury product markets have plenty of operators in the market. Thus, markets are open. Due to multiple operators in the market, there is a lack of indication of whether a specific luxury brand conglomerate has a dominant position in an individual market. Indications of LVMH leading position exists, still, indication on dominant position is missing. Furthermore, luxury markets are dynamic.

In addition, trademark holder or other intellectual property right holder is not automatically held to be in a dominant position although the exclusive right may seem to be applicable under Article 102 TFEU in theory. Furthermore, abusive behaviour, such as excessive pricing, may be even justified, as the consumers are willing to pay the excessive price of a product that is not necessity product. The high price indicates superior quality and good reputation, which is often the reason for consumer's purchase decision. Thus, brand loyalty is one factor among others why excessive prices are held justified in case of luxury trademarks. Therefore, trademarks are rather considered an enabling tool for the luxury products' other characteristics. In addition, price and cost analyses seem problematic in the light of luxury trademarks, as these are not taking into consideration factors relating to luxury products nature, in other words reputation and image matters as well as investments made. Even though a trademark may have better protection in the light of luxury products, it is still not justified to abuse dominant position.

ECJ's conclusion on case Coty was significant regarding luxury products and brands. The criteria regarding the protection of luxury products were established already earlier in previous case law. At first, the case Coty improved the three criteria established already in case Metro v Commission. The criteria are important in the light of luxury brands

because when fulfilling the criteria selective distribution system is allowed. In other words, when fulfilling the three criteria otherwise the prohibited action is allowed. Selective distribution systems are often used especially in the field of luxury brands – it allows better coordination on the selling of the branded products and the possibility to choose precisely the retailer. ECJ established improved protection for luxury goods and at the same time clarified existed legal uncertainty. Due to the conclusion of case Coty, special protection is allowed for protecting the prestige image of the product and the aura of luxury. Thus, the special protection is granted for products that are considered luxury. Therefore, it is justified to argue that selective distribution is treated differently in luxury brands.

Even though luxury products are having special protection regarding selective distribution, it is necessary to highlight the struggles occurring as well. One of the most probable is how is it measured whether the product is held luxury or not – and who is to make the evaluation. The conclusion of Coty will give legal certainty, but at the same time, it is raising questions. As it has been presented, luxury is not explicitly explained. Instead, some characteristics of the luxury products are common, but there is no guarantee that all types of luxury need to have those specifically.

In fact, luxury brands have been moved towards the pyramidal structure of the products – something for all. Thus, the perspective has changed, and the target group expanded. Luxury brand conglomerates are promoting mass luxury products, and the authentic position, regarding originality, has stepped aside. Therefore, competition may be argued to increase among luxury products. At the same time, the conflict between trademarks and competition law might be likely as the status of protection luxury trademarks has changed for a wider scope. Thus, it can be questioned whether the special protection is allowed for the newly structured model of luxury products.

The recent acquisitions made by Michael Kors indicates the dynamic nature of the luxury product market and the power of luxury brand conglomerates. Michael Kors has bought in the short run both Jimmy Choo and Versace. Both of these acquisitions were held significant, as the brands acquired are both well known. Moreover, according to the Michael Kors' CEO, there is even more to come. Thus, the luxury brand conglomerates' market shares may vary from time to time – the markets are dynamic. Regarding Michael Kors' acquisitions, for further research, it would be highly interesting whether these two

recent acquisitions have an effect on the prices of Michael Kors' owned brands, or are the consumers benefitting from the acquisitions.