

” The Use of IPR Strategies in Competition Law Conflicts - a Practical Approach”

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Preface

I have had the benefit to work as a fulltime trainee at MAQS Law Firm during a period of three months where I have mainly worked with practical tasks regarding intellectual property and business law. These areas are also the main areas of my master program Intellectual Capital Management given at Center for Intellectual Property (CIP). In the master thesis the program has for instance contributed through the structure of the three arenas and certain legal as well as business tools. The thesis is written before and after my trainee period where I have had a supervisor at the university and a supervisor at MAQS Law Firm. The core of the master thesis is business law where the focus has been to investigate legal and commercial tools, which are considered and used in a practical problem of distribution.

I would like to thank MAQS Law Firm and especially Christina Berggren for her support and continuous contribution of her practical experience within intellectual property and business law.

Furthermore there are a number of other persons experienced in the area of business law, competition law, intellectual property and contract law who have contributed with their knowledge and experience through interviews, which have become especially useful in the section about practical and commercial considerations. Thus I would like to thank:

Håkan Sjöström at Glimstedt, Peter Skoglund at Delphi, Jesper Sundström and Henrik Svensson at Wistrand, Ann-Charlotte Söderlund at Gozzo Advokater, Christina Ramberg, Susann Vahlenbreder Hecht and Johanna Björnum at Vinge, and Johan Lannering at MAQS Law Firm.

Last but indeed not least I would like to thank my supervisor Filip Bladini for his co-operation during the entire time.

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Abstract

Intellectual assets and their protection have become increasingly important for the businesses of companies. At the same time the competition law is there to maintain a sufficient balance, in order for big companies not to abuse the competitive advantage of IPR or marketing law. This thesis makes an examination of how this balance is maintained in practice.

The contribution of the thesis is an investigation of the different legal and commercial tools, which are used on the business arena by established actors and retailers, in relation to distribution agreements. An established actor has had a business relationship with a retailer for several years and has suddenly received new competition from a new actor. The legal, practical and commercial considerations of the established actor and the retailer will be examined in context of competition law, IPR regulations, marketing law and contract law.

Furthermore there is a mix of different tools on the business arena where a competition law problem might be solved through IPR, marketing law or contract law. Another issue is hence whether it is a satisfaction or a disappointment that other tools on the business arena solve an original problem of competition law. However the important task for the lawyer is to give the most cost efficient and successful tools to their client. Therefore the solution of the problem through other legal tools than competition law is not a problem on the business arena, as long as the balance between competition law and IP is kept. However, this is obviously difficult to ensure since the actors themselves make the solutions on the business arena.

Abbreviations

Competition Act	Swedish Competition Act 1993:20
EC	European Community
ECJ	European Court of Justice
IP	Intellectual Property
IPR	Intellectual Property Right(s)
Marketing Act	Swedish Marketing Practices Act 1995:450
Vertical Block Exemption	Commission Regulation (EC) No 2790/1999 of December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices
Technology Block Exemption	Commission Regulation (EC) No 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements
Prop.	Proposition

1. Introduction

In the world of globalisation we are heading towards a society where business is constructed with a new starting point, the intellectual assets. Intellectual assets are not tangible although they create a huge value and are often the source of the key value for many companies. Therefore the importance of protection against eager competitors, as well as ensuring competition on the market to create wealth and development, has increased. Hence IPR facilitate the need to protect creations of which one cannot physically touch such as patents, trademarks, copyrights, designs and trade secrets.

Whilst a company has established a creation, which has received IPR protection they must be prepared to defend the right(s) since they otherwise risk losing their value. Thus if an IPR holder lets actors enter the scope of protection of their IPR without payment, it does not provide any incentives for other actors on the market to pay for their use.

The different IPR stipulate different legal national regulations where the main purpose is to clarify their scope of protection, miscellaneous requirements and possible consequences in case of infringement.¹ Furthermore one of the aims of the *Swedish Marketing Practices Act 1995:450* is to protect distinctive and well-known products on the market.² In practice it means that even though a product is not protected by any IPR it might still be considered to be well-known and distinctive and hence other actors are prohibited to use imitations, which are misleading in relation to the product.

The fundamental purpose of IP rights is to grant the IP holder an exclusive right for a specific period of time. One crucial objective is to create incentives for the inventors since they due to the IP will be able to receive revenues as a compensation for their investment and effort.³ One efficient way to create value from an IPR is through a licensing construction. The licensee obtains a right to, for instance, produce, market or use a certain product.⁴ The IPR holders, the licensor, are then able to receive payment through license fees from many actors

¹ The most common IPR regulations are the Swedish Patent Act (1967:837), the *Swedish Trademark Act (1960:644)*, the *Swedish Design Act (1970:485)* and the *Swedish Copyright Act (1960:729)*. Henceforth they will be recognised as *Patent Act*, *Trademark Act*, *Design Act* and *Copyright Act* and jointly the *IPR Regulations*.

² Article 8. Henceforth the *Swedish Marketing Practices Act 1995:450* will be recognised as the *Marketing Act*.

³ Korah, Valentine, *An Introductory Guide to EC Competition Law and Practice*, 9th edition, Hart Publishing, Oxford and Portland, 2007, pp. 335-336.

⁴ Gölstam, Martin Carl, *Licensavtalet och konkurrensrätten*, Iustus Förlag, Uppsala, 2007, p. 106.

at the same time. However power struggles and fulfilments of self-interests should be experienced as something, which is not connected with IP.⁵ The aim is not to create welfare for the individual inventor but for the ultimate benefit of the consumers through technology diffusion. At the time IP becomes public for the consumers as well as competitors it enables and encourages development, which in the end will benefit the consumers.⁶

The main purpose of competition law is to maintain effective competition where the desire is to achieve economic efficiency and protect competitors as well as consumers.⁷ The basic theory is that competition increases the level of innovation.⁸ Monopoly, which is a market where there is only one seller, is the opposite of ideal competition. The reason is that legal monopolies, such as IP, prevent other undertakings to enter the market. Due to this fact the theory predicts that the price will be set as high as possible and hence only one competitor is allowed to compete. Consequently a monopoly could exclude competition within a specific market.⁹

At first sight there seems to be a conflict between competition law and IP. A monopoly may lead to market power depending on the substitutes on the market, which is the origin of the conflict. However one does not necessarily need to distinguish competition law and IP as a contradiction since they also complement each other. Competition law and IP have the common aim of improving innovation and support consumer welfare even if they approach the aim with different tools. The relationship between the two legal systems is nowadays focused on their accommodation rather than their potential clash. IP contributes to make competition more efficient and maintains access to market by striving to maintain a balance between early inventors and creators and the second ones.¹⁰ A balance between over- and

⁵ Petrusson, Ulf, *Intellectual Property & Entrepreneurship*, Reproman-Grimbo tryckeri AB, Göteborg, 2005, p. 12.

⁶ Peppercorn, L. IP Licenses and Competition Rules: Striking the Right Balance. 26 *World Competition*, 527-8, 2003.

⁷ Jones, Alison and Sufrin, Brenda, *EC Competition Law*, 3rd edition, Oxford University Press, 2008, pp. 3, 17

⁸ Anderman D Steven, *EC Competition Law and Intellectual Property Rights*, Great Britain, Oxford University Press, 2000. p. 17. Economic efficiency can be divided into allocative, productive and innovative efficiency. Allocative efficiency assumes that the price will certify that producers will produce products, which the consumers desire. Productive efficiency presumes that the producers will strive to produce products to the lowest possible cost with maintained quality due to competition from other producers. Finally, innovative efficiency supposes that the producers will compete with new technologies as well as using the best existing technologies.

⁹ Jones, Alison and Sufrin, Brenda, *EC Competition Law*, 3rd edition, Oxford University Press, 2008, p. 8

¹⁰ S.D. Anderman and J. Kallaugher *Technology Transfer and the New EU Competition Rules: Intellectual Property Licensing after Modernisation* (Oxford University Press, 2006).

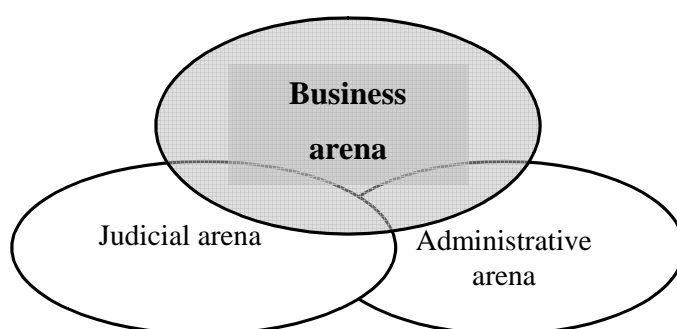
under-protection of the efforts of the innovators is necessary in order to keep competition as the driving force on the efficient markets.¹¹

The balance between IP and competition law seems to be sufficiently firm in theory, although how the balance is managed in practice will be investigated further.

1.1 The Three Arenas

The complexity behind IPR is to realise their different dimensions to create an understanding for how they could be used in practice. Therefore the three arenas is a significant tool at hand to facilitate an elaboration of the IPR. The judicial arena is where the court acts as a structural fundament of states and is used when an actor desires or threats to take legal action against another actor in court. The subject matter of the legal actions depends on the circumstances surrounding the problem. The administrative arena is where patent attorneys as well as the Patent and Registration Offices act. This arena could be used in case one for instance wishes to file for a patent or an opposition of a patent application. The business arena is the most significant arena from a practical point of view. In practise it is on the business arena where the actors negotiate and interact with each other by using tools, which could be provided from the legal and administrative arena.¹² The threat of taking legal action on the judicial arena or the threat of invalidating a patent on the administrative arena are tools which could be used in a negotiation or an infringement proceeding on the business arena.

Picture 1. The Three Arenas



¹¹ Peppercorn, L. IP Licenses and Competition Rules: Striking the Right Balance. 26 *World Competition*, 527-8, 2003

¹² Petrusson, Ulf, *Intellectual Property & Entrepreneurship*, Reproman-Grimbo tryckeri AB, Göteborg, 2005, p. 104 f.f.

The scope of protection for IPR might seem to be entirely decided in the regulations of the different IPR where the requirements of protection is stipulated. The scope of protection for patents is for instance determined by the patent claims according to *Article 39 Patent Act*. The patent claims are expressly written in the patent application and are granted by the Patent and Registration Office on the administrative arena. However, in practice, an infringement of IPR is not completely clarified until a court confirms the scope of protection on the judicial arena. The court will then apply the norms of legal regulations and decide whether an actor could be proven to have entered the scope of an exclusive right of another actor in a judgement. Nevertheless, the scope of protection is until the point of judgement determined on the business arena where actors claim their rights in relation to each other through negotiations, cease and desist letters and other communication. In these proceedings strong arguments as well as financial resources are of importance. Thus in practice the actions on the business arena are crucial.

Furthermore, the owner of an IPR could abuse its position by claiming their scope of rights by threaten potential competitors with legal actions or terminate agreements. In some cases the threats might be unjustified, however the victim might be prepared to end the significant activities or pay compensation rather than jeopardise a court action or a termination of a contract and its related costs.¹³ There is an obvious difficulty of controlling groundless threats of infringement proceedings with regard to possible breaches of competition law, IPR, marketing law and contract law.

1.2 Definition of the Problem and Questions

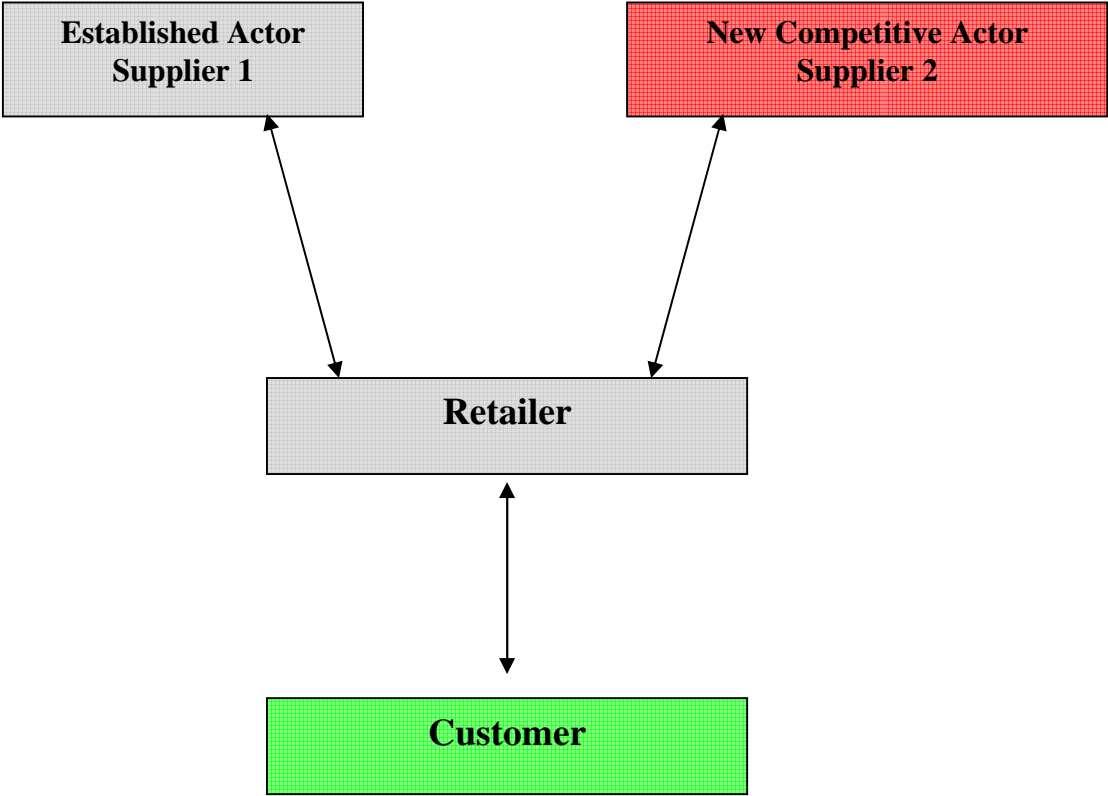
One practical issue in relation to the balance between IPR/marketing law and competition law can be found in distribution agreements. The situation emerges when an established actor, who has delivered goods which are being protected by IPR law, or marketing law, to a retailer for several years suddenly face fierce competition, see *Picture 1*.¹⁴ This could happen when a new actor, with production in a country with low production costs such as Eastern Europe or China, enters the market and starts to deliver similar goods to the same retailer. However the

¹³ Bainbridge, David I, *Intellectual Property*, 6th edition, Pearson Longman, Essex, 2007, p. 14.

¹⁴ The terms “supplier”, “established actor”, “retailer”, “new actor” and “customer” will be used throughout the thesis for reasons of simplification although the actors might have other definitions depending on business or which part of the distribution chain that is investigated.

new actor is able to sell the goods for a lower price due to low production costs and hence has a competitive advantage. The established actor is sometimes willing to take severe actions to make the new actor disappear from the market because of reluctant lost of several market shares.

Picture 2. The Scenario



In one practical case regarding office supply products, the established actor claimed that the new actor as well as the retailer breached *Articles 4,6 and 8 of the Marketing Act*. The writing material were claimed to be distinctive and well-known products on the market. Therefore a breach of the *Marketing Act* was argued to be committed on the business arena. The established actor indicated to the retailer that they would not receive any more office supply products from them unless they ceased buying products from the new actor. This claim was made even though no exclusivity requirement had been agreed upon. The case never went to court since it was solved on the business arena through letters regarding whether a breach of the *Marketing Act* had been committed, amendments of the goods, negotiations and money.

The conflict took place and was solved on the business arena where different legal and commercial tools were used. In relation to the scenario the following questions are of interest, which this master thesis aims to investigate further and hopefully provide with answers.

- What main legal and commercial strategies and tools need to be considered to develop a solution between the established actor and the retailer in the given scenario on the business arena?
- The threat of ceasing to sell the products could comprise a breach of competition law, which in practice was solved through the tools of marketing law, IPR and contract law.¹⁵ Is it a satisfaction or a weakness to solve a potential competition law problem by the tools of IPR, marketing law and contract law on the business arena?
- Furthermore another issue regards whether the established actor used tools on the judicial arena in an appropriate way on the business arena. Could the established actor legally claim that the office supply products were able to fulfil the requirement of distinctiveness? What could be the risks and consequences if the scope of distinction or protection is claimed to be too wide?
- Another issue concerns whether the established actor was able to demand that the retailer should cease selling of products of the other actor even though they had not agreed upon an exclusivity clause. If no exclusivity clause is agreed upon in the contract, could the retailer still have committed a breach of contract?

1.3 Purpose

The purpose of the master thesis is to investigate the legal and commercial strategies on the business arena. The focus is the given scenario in *Picture 2* in relation to distribution agreements, where the legal tools will concern competition law, IPR law, marketing law and contract law. The key is to investigate the legal and commercial tools, which the established actor and the retailer successfully may use where the balance between IPR/marketing law and competition law is significant. The business arena will be in focus since it is the most significant arena in practice as stated above. However, certain arguments and tools on the judicial and administrative arena are used in the game of claiming between the actors on the business arena and are thus of importance to examine.

¹⁵ In the given scenario the office supply products as such did not have an IPR protection, although they could have since it is quite common. Thus the IPR scenario will be investigated as well.

The main issue to examine is whether it is satisfying that other legal tools, such as IPR, are used as solutions on the business arena when the issue originally is a competition law problem. There are a number of different legal regulations applicable in the described scenario as indicated above. The legal regulations as such are often not particularly complicated to use. The challenge lies instead in deciding which of the legal tools that is predicted to be the most successful within the legal and commercial strategy of the actor, which the lawyer is representing. Therefore the purpose is not to provide the reader with a profound legal analysis within each legal area. Instead the thesis will focus on the legal and business strategies within the crucial legal areas relating to the problem: competition law, IPR law, marketing law and contract law.

1.4 Method and Disposition

Except for obvious legal regulations, cases and different interpretations given in literature and articles, a number of interviews with different experienced lawyers have been made.¹⁶ These interviews have been used as an inspiration under the section regarding Practical and Commercial Considerations.

The judicial, administrative and business arenas, which are explained above, have been used as a structure in the thesis. The first part regards the legal regulations in relation to distribution agreements. The arguments are originally taken from the judicial and administrative arena, although they are significant tools on the business arena. At the end of each section a summary in relation to the scenario in *Picture 2* will follow. After the section of the tools on the judicial and administrative arena, a section regarding the practical and commercial considerations of the scenario will be outlined. The conclusion will contain a map of a compilation of the different tools surrounding the scenario.

1.5 Delimitations

The thesis is written with the eyes of a legal adviser, where the tools and arguments surrounding the described scenario are in focus. The thesis will concentrate on the

¹⁶ See Preface.

relationship between the established actor and the retailer since it is the distribution situation, which is the core, see *Picture 2*. Swedish law has been the primary focus throughout the thesis.

The legal advice will indeed be different depending on the specific business, market position and resources as well as attitude of the client. The possibility to cover each situation is limited and instead the most crucial considerations will be investigated.

2. The Tools on the Judicial and Administrative Arena

In the following the relevant judicial and administrative tools in relation to the scenario will be outlined. The legal regulations are in most cases used as arguments on the business arena in context of negotiations or other communication between the established actor, the retailer and the new actor on the business arena. Usually the actors try to settle these types of disputes before they go to court since court proceedings incorporate a lot of costs as well as the risk of revealing secrets of the company. However sometimes a trial is the only option if the parties are unable to reach a settlement.

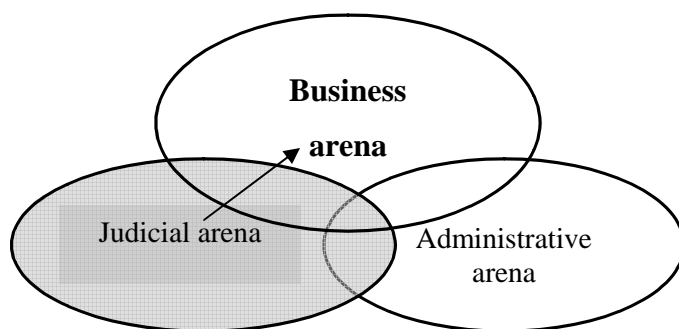
2.1 The Norms of Competition Law

In context of the practical problem described above competition law in relation to distribution agreements is of importance to consider. Few markets reach to the level of being completely competitive. EC competition law has a significant impact on Swedish law and it is therefore beneficial for an actor on the business arena to be aware of its function. According to *Article 3* in *Regulation 1/2003* national authorities and courts shall apply EC competition law directly if an agreement could have effect on trade between member states.¹⁷ Hence EC competition law could support actors who wish to use competition law as a tool. As Swedish competition law is based on the EC regulations, the Swedish regulations are obviously just as useful in Sweden.

¹⁷ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. See also Karnov, comments to *Competition Act*, note 5. Hence *Regulation 1/2003* has made it possible for the national courts to apply EC competition law directly.

The actors who endeavour to use competition law need to be familiar with the general economic concepts of market power, market definition and barriers to entry. Market power is when actors can raise prices in a specific market without losing sales to the extent that the rise would become unbeneficial.¹⁸ Many firms have market power in a short term although competitors usually discover successful firms rather soon and they are therefore usually not likely to enjoy market power for a long time.¹⁹ The number of market shares, which an actor has on a specific market is an important factor to determine potential market power. Although a high market share where an actor has 100 per cent market power does not necessarily mean that the actor has a monopoly from an economic point of view. The market shares do not give the full picture in terms of why the actor has a high market power and its potential substitutes. Therefore the term “barriers to entry” is crucial to examine since it takes into consideration whether a market is vulnerable in terms of how easy other actors are able to enter the barriers.²⁰ Furthermore the relevant market is obviously crucial to define to investigate the market power of an actor. In order to determine the relevant market one should assess the conditions of the product and the geographical market.²¹

2.1.1 The Tools of Distribution Agreements on the Judicial Arena



¹⁸ Jones, Alison and Sufrin, Brenda, *EC Competition Law*, 3rd edition, Oxford University Press, 2008, p. 58-59.

¹⁹ Korah, Valentine, *An Introductory Guide to EC Competition Law and Practice*, 9th edition, Hart Publishing, Oxford and Portland, 2007, p. 11: In certain cases successful firms still have the benefit of market power since they for example become more than usually efficient or if other firms cannot enter the market freely.

²⁰ Jones, Alison and Sufrin, Brenda, *EC Competition Law*, 3rd edition, Oxford University Press, 2008, p. 84 f.f.

²¹ Commission Notice on the Definition of the Relevant Market for the purposes of Community Competition Law [1997] OJ C372/5, [1998] 4 CMLR 177. See also *United Brands v. Commission*, Case 27/76 [1978] ECR 207. The geographical market is the geographical area including the undertakings involved in the supply and demand of the product or service and where the conditions of competition are sufficiently homogenous as well as particularly distinguished from other areas. The product market is distinguished by including all services or product, which are interchangeable or substitutable through their characteristics, price and their intended use.

The Swedish competition law is regulated in the *Swedish Competition Act 1993:20*,²² which has the aim to eliminate and counteract obstacles to effective competition in the field of production of and trade in goods, services and other products according to *Article 1 Competition Act*. The central prohibitions are found in *Article 6 Competition Act*, which concerns agreements preventing competition; and *Article 19 Competition Act*, which regards abuse of a dominant position.²³ In context of the scenario described above both *Article 6 Competition Act* and *Article 19 Competition Act* might become applicable as tools from the judicial arena. The main rule in *Article 6 Competition Act* states that distribution agreements, which to an appreciable extent, prevent, restrict or distort competition by object or effect, are prohibited. The object to prevent, restrict or distort competition is fulfilled in case the possibility of a company to act independently in relation to other companies is limited due to an agreement, which for instance could be an exclusivity requirement as will be discussed below.²⁴

An agreement or a single provision, which are prohibited according to *Article 6 Competition Act*, shall be void according to *Article 7 Competition Act*. Hence if the established actor and the retailer have agreed upon an agreement, which prevents, restricts or distorts competition, the consequences can become substantial.

2.1.1.1 Distribution Agreements and Relevant Block Exemption

However if an agreement contributes to improving the production or distribution or promoting technical or economic progress there is an exemption in *Article 8 Competition Act*, which permits these types of agreements.²⁵ *Article 8a Competition Act* clarifies that there are

²² Henceforth *Competition Act*.

²³ Karnov, comments to *Competition Act*, note 1: Article 6 and Article 19 has been written with *Article 81* and *Article 82* in the *EC Treaty* as models.

²⁴ Karnov, comments to *Competition Act*, note. 6, 8. If no object that will prevent, restrict or distort competition in an agreement can be found, an investigation whether the agreement has an effect, which will restrict competition, will be done. Finally, the agreement must restrict competition to an appreciable extent, which is based on the economic impacts of the agreement on the relevant market such as market shares of the parties, annual turnover of the parties and the significance of the restriction as such. The standard level for an appreciable extent is that the total market shares of the parties of the agreement reaches 15 per cent, if they are non-competitors. Additionally as long as the turnover of one of the parties does not exceed 30 million SEK the agreement is usually seen as not being restrictive to an appreciable extent.

²⁵ The corresponding EC regulation is *Article 81(3) EC Treaty*: The pre-requisites are furthermore that the agreement shall allow consumers a fair share of the resulting benefit and that it only imposes on the undertakings concerned restrictions which are indispensable to the attainment of the objective referred to in paragraph 1. Additionally the agreement shall not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the utilities in question.

categories of agreements, called block exemptions, which satisfy the conditions in the exemption of *Article 8 Competition Act*.²⁶ The function of a block exemption is to operate as a safe harbour where agreements are exempted even though they are infringing *Article 6 SCA* or *Article 81(1) EC Treaty*. There are block exemptions provided for different categories of agreements, vertical and horizontal. Distribution agreements are considered to be vertical agreements, since the agreement concerns two parties acting on different levels in the distribution chain, which are not direct competitors.²⁷ Hence the vertical block exemptions are of interest to examine since the focus of the thesis is the relationship between the established actor and the retailer, which are acting on different levels in the distribution chain.

In context of distribution agreements and IP there are two vertical block exemptions, which might become applicable in relation to the problem: the *Vertical Block Exemption* and the *Technology Block Exemption*.²⁸ The *Vertical Block Exemption* will be in focus in this examination since it is the main exemption for distribution agreements. However the *Vertical Block Exemption* is not applicable if IPR is the primary object of the agreement.²⁹ The Swedish block exemptions are rather short since they refer directly to the EC block exemptions.³⁰ Thus the EC block exemptions will be referred to in the following.

2.1.1.1.1 Investigation before Drafting a Distribution Agreement

A key question from a competition law perspective for a the established actor or its lawyer, who is writing the agreement, is to make sure that possible vertical restraints do not breach *Article 6 Competition Act*. The agreement should in that case fulfil the requirements in the relevant block exemptions. In practise it is the actor or its lawyer who makes the assessment

²⁶ Prop. 2007/08:135 p. 37: A government bill has been proposed incorporating the EC block exemptions specifically in Swedish law, which will become effective 1 November 2008.

²⁷ Jones, Alison and Sufrin, Brenda, *EC Competition Law*, 3rd edition, Oxford University Press, 2008, p. 679.

²⁸ Förordning (2000:1193) om gruppundantag enligt 8 a § konkurrenslagen (1993:20) för vertikala avtal and Förordning (2004:1073) om gruppundantag enligt 8 a § konkurrenslagen (1993:20) för avtal om tekniköverföring

²⁹ *Article 2(3) Vertical Block Exemption* states that agreements relating to the use of IPR are applicable to the exemption unless it does not constitute the primary object of such agreements. This stipulation may at first sight indicate some difficulties since one might need to buy a specific good and a license to use it. However the *Technology Block Exemption* will cover the IPR in case it is the main object of the agreement according to Korah, Valentine, *An Introductory Guide to EC Competition Law and Practice*, 9th edition, Hart Publishing, Oxford and Portland, 2007, p. 325.

³⁰ Commission Regulation (EC) No 2790/1999 of December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices and Commission regulation (EC) No 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements.

of compliance with the block exemption and hence the block exemption comprises a rather considerable element of self-assessment.³¹

The block exemption is applicable if the supplier of the products or services does not exceed the market share threshold of 30 per cent and the agreement does not comprise any hardcore restraints.³² Hardcore restraints are specifically serious restrictions, which are almost always considered to be prohibited and are unlikely to fulfil the justifications under *Article 8 Competition Act* and *Article 81(3) EC Treaty*.³³

In context of calculating the market shares it is the market shares of the supplier, which is significant.³⁴ As stated above the definition of the relevant market is crucial to determine to be able to calculate the market shares on that specific market. In practice the limit of the market share is useful, especially if the established actor is a small or medium sized company. As long as they follow the relevant block exemption they can assume that they comply with competition law.

2.1.1.2 Vertical Restraints in relation to Distribution Agreements

Vertical restraints of an agreement are able to generate both positive and negative effects on a competitive market, which is useful to know for actors who are drafting an exclusive distribution agreement. According to the Commission, vertical restraints can do little harm to competition if parties in an agreement lack market power. They may instead lead to cost savings and other efficiencies. The most significant justifications for vertical restraints stipulate that they may be justified if they for example solve a free-rider problem, open up or enter new markets or create economics of scale in distribution.³⁵

³¹ Jones, Alison and Sufrin, Brenda, *EC Competition Law*, 3rd edition, Oxford University Press, 2008, p. 856

³² *Article 3 Vertical Block Exemption*.

³³ Jones, Alison and Sufrin, Brenda, *EC Competition Law*, 3rd edition, Oxford University Press, 2008, p. 761. According to *Article 4(a) and (b) Vertical Block Exemption* a supplier is never authorised to fix the price or restrict the territory at which retailers shall resell his products. Retailers shall decide where and to whom they wish to sell to themselves. According to *Article 4(c) and (d)* selective distribution is not allowed since the retailers cannot be restricted in relation to who will be their end-customer and additionally they cannot be forced to purchase contract goods entirely from one supplier. Finally these last hard-core restriction concerns the access to spare parts according to *Article 4(e) Vertical Block Exemption*.

³⁴ See section 2.1 for a further explanation of the market definition. Although there is one exemption when the supplier agrees to one exclusive buyer within the Community, then it is the market share of the buyer, which is relevant.

³⁵ Guidelines on Vertical Restraints, OJ 2000, C291/1, 115-118. See also W.S Comanor, Vertical Price-fixing, Vertical Market Restrictions, and the New Antitrust Policy, (1985) 98 *Harvard LR* 983, 986-90.

Free riders are actors, who do not respect or do not have knowledge of possible exclusive rights and basically take a free ride on the investment of another actor. Intellectual assets, which do not obtain IPR, can easily be faced with the free rider-problem. In context of the scenario, see *Picture 2*, the new actor could be considered to be a free rider depending on the circumstances. Free riders create problems for many actors in different situations by copying their products. From a short-term perspective free riders might increase competition although in the longer term they reduce competition since the first movers will be less willing to invest if other actors get a free ride.³⁶ Thus vertical restraints such as exclusive distribution agreements are helpful when an established actor desire to prevent new actors from taking a free ride on the marketing efforts of an established actor.

However vertical restraints can also have negative effects because they do not necessarily lead to the most efficient result. Critics mean that the different preferences of the consumers need to be taken into consideration before any restraints shall be made.³⁷

2.1.1.2 .1 Exclusive Distribution and Exercise of IPR

In relation to the *Vertical Block Exemption* there are different types of exclusivity to consider when drafting a distribution agreement. The exclusivity when the retailer is obtaining an exclusive right to sell the specific goods of a supplier within a certain area is permitted as long as the market shares of the supplier are below 30 per cent. The main rule is that it is the market share of the supplier, which is relevant. Although the market share of the buyer could be relevant in case a supplier grants an exclusive right to an exclusive buyer within the EU. If the market share exceeds 30 per cent it is assumed that other retailers could have a significant barrier to enter the market. Subsequently an analysis of factors such as market position of the supplier, position of competitors, entry barriers, buying power, the maturity of the market and the level of trade needs to be made. The higher market power a supplier has, the more severe is the loss of intra-brand competition, which is the competition between the same products of the same brand.³⁸

³⁶ Korah, Valentine, *An Introductory Guide to EC Competition Law and Practice*, 9th edition, Hart Publishing, Oxford and Portland, 2007, pp. 24-25.

³⁷ W.S Comanor, Vertical Price-fixing, Vertical Market Restrictions, and the New Antitrust Policy, (1985) 98 *Harvard LR* 983, 992-9 and Guidelines on Vertical Restraints, OJ 2000, C291/1, 103.

³⁸ Commission Guidelines on Vertical Restraints (2000/C 291/01) para 161-174.

In the scenario, see *Picture 2* above, the retailer is not excluded to buy and sell products from solely the established actor. Another type of exclusivity is hence when the established actor and the retailer have agreed upon a non-compete arrangement, also recognised as “single branding”. Then the commitment will oblige the retailer to purchase all needed products or services on a particular market from solely the established actor. Non-compete arrangements between suppliers and retailers, which exclude other competitors, are permitted for a maximum period of 5 years. Furthermore they are allowed as long as the market shares of the supplier do not exceed 30 per cent as stipulated above.³⁹

The purpose of the exclusivity above is to show the requirements, which need to be considered before an exclusivity clause is written. However, if the scenario has already occurred and if the retailer acknowledges a questionable IPR protection of a product, the effect could be the same as an exclusivity requirement. If the arrangement does not fulfil the above exclusivity requirements this could also constitute a breach of *Article 6 Competition Act*.

In context of infringement of competition law and the exclusivity of an IPR the ECJ has made a distinction between the very existence and the exercise of IPR.⁴⁰ The existence should comprise the “essential function” or the “subject matter” of the IPR. The exclusivity of an IPR and its exercise do not in themselves constitute an infringement of competition law notwithstanding the prohibitions on prevention, restriction or distortion of competition in *Article 6*.⁴¹ If an IPR license is considered to be included in an agreement the actors must ensure that an IPR license must not “serve to give effect to”, or “be the means of” an agreement which in itself is prohibited as a prevention of competition under *Article 6 Competition Act*. This interpretation is applicable even if the agreement involves an exclusive license.⁴²

³⁹ Commission Guidelines on Vertical Restraints (2000/C 291/01) para 138-139.

⁴⁰ Ritter Lennart and Braun W. David, *European Competition Law: A Practitioner's Guide*, 3rd edition, Kluwer International, 2004, p.p. 787 f.f.

⁴¹ Anderman D Steven, *EC Competition Law and Intellectual Property Rights*, Great Britain, Oxford University Press, 2000. p. 12. See also *Parke Davis v Probel*, Case 24/67 [1968] ECR 55 and *Deutsche Grammophon Gesellschaft mbH v Metro-SB-Grossmarkete GmbH & Co*, Case 78/70 [1971] ECR 487.

⁴² *Coditel II*, Case 262/81 [1982] ECR 3381.

The vertical restraint of exclusive distribution agreements is a rather common phenomenon since the retailer obtains incentives to sell and promote certain goods within a specific market. The more exclusivity a retailer obtains the more likely it is that the agreement incorporates additional capital for the supplier. As previously discussed vertical restraints such as exclusive distribution agreements have a number of positive effects since it tends to stimulate competition even though it at the same time restricts it. At the time the supplier decides to solely have one retailer transaction costs will be saved, feed-back from the customers will easier be accessible and the free rider problem, previously discussed, can easier be solved.⁴³ Exclusive distribution agreements will not restrict competition if the appointment of the exclusive retailer is necessary to construct and penetrate a new market.⁴⁴

2.1.1.3 Refusal to Supply

In relation to *Article 19 Competition Act* regarding abuse of a dominant position there is in particular one abuse, which could become considerable in relation to the scenario: refusal to supply. The established actor could be tempted to punish the retailer by refusing to supply the agreed products or even terminate the agreement, as a consequence for dealing with the new actor on the business arena. The pre-requisite is evidently that the established actor in the scenario obtains a dominant position in the defined market.

Chiquita punished for instance the trader Mr Olsen for buying bananas from another company with another brand of bananas in the fundamental case *United Brands*. The abuse of the dominant position was the refusal to supply Mr Olsen with bananas.⁴⁵ Hence actors who obtain a dominant position within a specific market should be careful of refusing to supply as well as terminating agreements with their retailer without having an objective reason.

In context of IPR the ECJ has declared that a refusal to grant an IPR license is not in itself sufficient to be considered as an abuse of a dominant position under *Article 82 EC Treaty (Article 19 Competition Act)*.⁴⁶ The IPR must be used as a tool of abusing a dominant position to constitute a breach of *Article 82 EC Treaty*, which was stipulated in relation to

⁴³ Jones, Alison and Sufirin, Brenda, *EC Competition Law*, 3rd edition, Oxford University Press, 2008, p. 723.

⁴⁴ *Société La Technique Minière v. Maschinenbau Ulm GmbH*, Case 56/65 [1966] ECR 234.

⁴⁵ *United Brands v. Commission*, Case 27/76 [1978] ECR 207.

⁴⁶ *Volvo v Veng (UK)*, Case 238/87 [1988] ECR 6211. As stated above the corresponding *Article 82 EC Treaty* in the *Competition Act* is *Article 19*

trademark rights in *Hoffman la Roche*.⁴⁷ The *Magill* case stated that the exercise of exclusive rights by the proprietor might in exceptional circumstances concern abusive behaviour. In *Magill* the TV companies refused to license *Magill*, which prevented him from launching a new product for which there was a possible demand and which was not offered by them. This was considered to be an abuse under *Article 86(b)* (today *Article 82 (b)*) since no objective justification was obtainable by the TV companies.⁴⁸

2.1.2 Summary in Relation to the Scenario

In practise a lawyer who aims to make a sufficient analysis of competition law in relation to an IPR distribution agreement for their client should first of all investigate if any consideration to the *Competition Act* are required. The definition of the market is significant to find out the market shares of the supplier in order to establish which of the different competition law regulations, which could become applicable. In relation to writing an exclusive distribution agreement *Article 6-8* as well as *19 Competition Act*, together with the *Vertical Block Exemption* as well as *Technology Block Exemption*, should be examined depending on whether the IPR is the primary objective of the agreement. The block exemptions are crucial to investigate if the agreement in question concerns a product or service having a relatively small market share, or at least below 30 per cent. If a block exemption is applicable the supplier must primarily make sure that no hardcore restraints are included in the agreement.

Considering the defined case where the established supplier wishes to sign a distribution agreement with a retailer it is crucial that the lawyer of the supplier is there to assure that there are relevant incentives as well as conditions for the actor, which the lawyer is representing. Both push and pull needs to be incorporated since there otherwise is a risk that one party will not have any incentives to be obligated to follow the agreement.

Exclusive distribution agreements are crucial incentives as well as protection from free riders although there is a risk that an obligation of exclusivity is restricting competition. Therefore the actors shall consider how to provide an accurate balance in relation to the exclusive requirements provided in the block exemption. The block exemptions facilitate guidelines,

⁴⁷ *Hoffman la Roche v Commission* Case 102/77 [1978] ECR 1139. See also Anderman D Steven, *EC Competition Law and Intellectual Property Rights*, Great Britain, Oxford University Press, 2000. p. 13.

⁴⁸ *RTE v Commission (Magill)*, [1995] ECR I-743.

which shall be followed when drafting a distribution agreement to more or less make sure that the agreement does not breach competition law. In case an agreement is infringing competition law, the breach of competition law can be used as a tool on the business arena in a negotiation between the actors.

2.2 The Norms of IPR

In the given scenario IPR might be involved in the distribution agreement more or less. IPR are rights connected with creative work or commercial reputation and goodwill.⁴⁹ These rights are not tangible although they still have obtained the level of being treated as property from a legal perspective since they can be owned and dealt with.⁵⁰ IPR is an intellectual phenomenon, which do not exist in themselves. The key to the existence of IP is that they are acknowledged by society and that actors respect them.⁵¹

IPR such as patents, trademarks, copyrights, design and other intellectual property have become legally accepted even though they may keep new competitors out of the market for a certain period of time.⁵² However the discussion regarding IP has taken different approaches. One approach has been that after an investment, *ex post*, incentives to invest are no longer of importance and an exclusive right may constitute barriers to entry. Thus the IPR system can be considered to be anti-competitive since other actors are not able to use the protected investment without the consent of the IPR holder. The IP holders are then able to charge high prices. On the other hand, if IP instead is analysed from the time when the decision to invest in an innovation or art was made, *ex ante*, the investment would not have been worthwhile if the incentives of an IPR would not have been in sight. The consumers might end up in a better position since IP might even increase competition due to expected incentives for inventors and creators. Additionally some inventions can appear easy to copy at the time they enter the market and without IPR protection they would not have been worth the investment.⁵³

⁴⁹ Bainbridge, David I, *Intellectual Property*, 6th edition, Pearson Longman, Essex, 2007, p. 3.

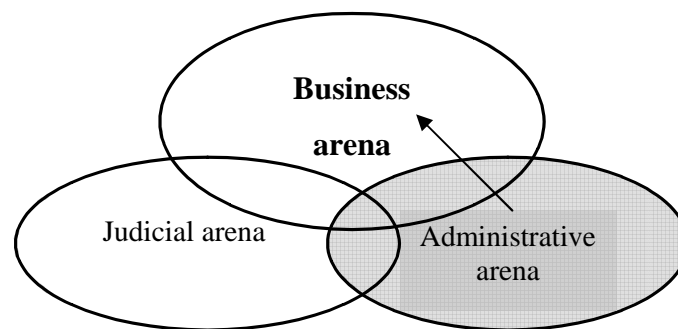
⁵⁰ Bainbridge, David I, *Intellectual Property*, 6th edition, Pearson Longman, Essex, 2007, p. 10.

⁵¹ Petrusson, Ulf, *Intellectual Property & Entrepreneurship*, Göteborg 2005, Reproman-Grimbo tryckeri AB

⁵² Except for these IPR there are several different forms of rights, which can give rise to IPR such as trade secrets, rights in performance, the law of confidence, passing off, malicious falsehood (trade libel), see Bainbridge, David I, *Intellectual Property*, 6th edition, Pearson Longman, Essex, 2007, p. 3.

⁵³ Korah, Valentine, *An Introductory Guide to EC Competition Law and Practice*, 9th edition, Hart Publishing, Oxford and Portland, 2007, pp. 335-336.

2.2.1 Administrative Tools of IPR on the Business Arena



In practice it is significant to analyse the IPR of the different actors, which they need to claim in order to obtain the exclusive rights on the business arena. In order to obtain a registered exclusive right the inventor or creator needs to show the Patent and Registration Office that the creation fulfils certain requirements. For each IPR the requirements and scope of protection are stipulated according to different legal regulations.⁵⁴ However the interpretation of the legal regulations in reality concerns primarily about claiming rights in relation to other actors on the market. The administrative tools could be used against a counter party in relation to the scenario on the business arena.

If the retailer or the new actor wants to attack the established actor they should investigate if the fundamental requirements of the IPR are fulfilled and make sure that the IPR is valid. The examination of validity of a patent includes making sure that the annual fees have been paid. Another crucial investigation is what the scope of protection really could comprise and if an infringement could be claimed to be committed. In case the IPR concerns a patent the examination should concern what could be included within the patent claims, which define the scope of protection. Hence if an actor has entered the scope of protection an infringement has been committed. The retailer will probably try to argue that they have not entered the scope of protection if they have the possibility. The established actor on the other hand will endeavour to claim that the patent is valid and that the retailer has entered the specific scope of protection according to the patent claims.

⁵⁴ See Article 1,2, 3 and 39 in the *Patents Act*, Article 1, 4, 6, 13 and 14 in the *Trademarks Act*, Article 1 and 2 in the *Copyright Act*, Article 1, 2 and 5 in the *Design Act*.

The actor who has the strongest case is the one that other actors on the market will believe in on the business arena. The case of the actor is dependent on how the outcome of the case is deemed to be on the other arenas. If an actor has a weak case on one of the arenas there is a risk to lose the case on another arena. For instance if the annual fees of a patent are not paid on the administrative arena an actor will not be able to claim to have a valid patent on the business arena.

2.2.2 Judicial Tools of Marketing Law

In relation to the scenario provisions in the *Marketing Act* were used. In respect of the *Marketing Act* it does not matter if the product is protected by an IPR since the interpretation of *Marketing Act* relates to well-known products, which do not necessarily need to have obtained an IPR protection. The argumentation is basically focused on whether the products could be considered to be distinctive and well-known within a specific market where the most relevant articles are *Article 4,6 and 8 Marketing Act*.⁵⁵

Article 4 Marketing Act is a general clause stating that marketing shall comply with good marketing practices. A successful argumentation of the established actor should be built upon that the retailer or the new actor is using the reputation of the product, where the result could be a breach of *Marketing Act*. A number of actors have been forced to cease their sales since they have sold goods similar to the products of suppliers, which have been able to prove that they have used the reputation of their products.

Article 8 Marketing Act states that a businessman in connection with marketing of his products may not use imitations, which are misleading in the respect that they can be easily confused with another businessman's well-known and distinctive products. However the requirements are never fulfilled for designs, where the purpose is to make the product functional.

The total impression when comparing two products is the core when deciding if a product is easily confused with another businessman's products. The criterion of distinctiveness requires

⁵⁵ *Article 6 Marketing Act* stipulates that a businessmen may not in connection with marketing use statements, which are misleading in relation to the businessman's or another businessman's business. The use of a certain sign can for instance cause confusion as to the origin of the product in question.

that the product must have a design that in an esthetical manner distinguishes the product from other similar products, in order to be clearly identified by the buyers. In order for a product to be distinguished as well-known the buyers must be aware of the product to such extent that they associate the product with its producer.

2.2.2.1 Misuse of IPR

A way in which the owner of an IPR or the owner of a product protected under *Marketing Act* can abuse its position is to threaten potential competitors with legal action, which will take place on the judicial arena. Indeed the established actor needs to have a case based on the requirements in the legal regulations above in order to be able to argue against other actors. However in some cases the threats may be unjustified, but the victim might be prepared to cease the relevant activities or pay compensation rather than risk the court action and its attorney costs. Litigation can be very expensive, and this may deter the person threatened from challenging the validity of the right concerned or otherwise defending the alleged infringement.⁵⁶

Since undertakings are striving for cost efficiency they usually wish to solve the conflict before it comes to court as stated earlier. Therefore, it is rare to find any evidence of this type of behaviour since the parties usually needs to consider commercial aspects, when they shall decide whether to risk being subject to legal action. Many companies decide not to act or modify their products since it will be more cost efficient.

There are few cases, which have been determined in court, where for example unreasonable letters between supplier and retailer have been written. If the supplier wants to approach the retailer by writing a letter, it is crucial not to write an inappropriate letter, containing insignificancies. An established actor who wants to take actions towards the retailer are sometimes willing to claim more rights than they actually have. However the consequences can be a breach of the *Marketing Act* and the fact that it could be a breach could be used as a tool in a negotiation or a letter on the business arena.⁵⁷

⁵⁶ Bainbridge, David I, *Intellectual Property*, 6th edition, Pearson Longman, Essex, 2007, p. 14

⁵⁷ Cases regarding letters where the scope of protection was insignificant:

NJA 1953 p. 775, Splitkein, is the only judgement regarding damages and cease and desist-letters in Sweden. The company Splitkein had got the right to use two patents in relation to an acquisition of a ski factory although

2.2.3 Summary in Relation to the Scenario

When claiming a specific scope of protection, no matter if it seems reasonable it can still never be for certain what is included within that scope until a court has made its judgement. The scope of the IPR is not defined until somebody has challenged it in court. Since IPR is all about claiming it is difficult to assume how much an actor really may claim before it can be considered to be insignificant. There are few cases, which have been taken to court regarding this matter. However, if the retailer notices that an actor is trying to include too much in the scope the marketing court cases could indeed be used as a tool on the business arena. Then the retailer could argue that the claiming of a too wide scope could be considered to be a breach of the *Marketing Act*. This could be a useful tool to use against the established actor.

Furthermore, an actor should always examine how strong the IPR of a product is and if it is valid. If the general requirements are not fulfilled there is a risk that an actor challenges the IPR, which then risks to become invalid. The tool of invalidity could also be used on the

one of the patents where invalid due to a lack of payment of the renewal fees. Splitkein sent a letter to a new ski factory where they stated that they committed an infringement of their two patents and that they should cease the manufacturing of the skis. The Supreme Court in Sweden stated that Splitkein where in good faith in relation to the valid patent, although should be held responsible for the incorrect information in the letter. Splitkein should have taken into account that the new ski factory would approve the allegation of patent infringement due to the seriousness of the letter. The judgement took place in 1953 although it probably still has authority according to Bernitz, Ulf, and others. *Immaterialrätt och otillbörlig konkurrens*, 10th edition, Jure, Stockholm, 2007, p. 360

MD 1999:28 was determined in the Swedish Market court and regarded the Swedish Maritime Administration, which claimed that they had copyright of nautical charts. The Swedish Maritime Administration sent out letters to thirteen retailers of the German Nautische Veröffentlichung Verlagsgesellschaft mbH (NVV), where they stated that the NVV infringed their copyright and refused to pay license fees. The letters where sent vertically to a big number of retailers, which is against the normal infringement procedure where letters are sent horizontally, to competitors. The court stated that the wording in the letter gave the impression of that NVV had infringed the copyright of the Swedish Maritimes Administration and that the marketing of the nautical charts of NVV was prohibited. Furthermore the letter could also be interpreted as a letter from a public authority, which reinforces the content. Since the Swedish Maritime Administration had not shown that there is a reason for the far-reaching statements they breached the *Marketing Act*. The extraordinary with this case is that the actor acting in an inappropriate way was the Swedish Maritime Administration.

MD 2002:25 regarded tea where an English trademark agency had sent letters to the customers of the company LivsHälsa. In the letters it was stated that LivsHälsa made a trademark infringement by selling a specific tea under an incorrect name with a request that the customers should cease the sales of that tea. Some of the letters were not infringing the trademark since they were not deemed to be far-reaching in its wording and therefore they were accepted according to *Marketing Act*. Although some of the letters contained severe wordings, which gave the statements of trademark infringement a significant substance. The claimed infringement together with the threat of legal actions and damages were not supported by the circumstances in the case and were therefore unjustified. Hence a breach of *Article 4 Marketing Act* was committed.

Furthermore see: MD 1992:15, MD 1994:25, MD 1996:18, MD 2004:14 and MD 2006:2.

business arena when negotiating with the counterparty. The retailer could for instance argue, that if the supplier permits that the retailer can buy products from the new actor, the retailer will not try to invalidate their IPR. This means that a settlement could be accomplished through using tools from the administrative arena, which could satisfy both parties.

2.3 Contract Law

The contract law in relation to distribution agreement is of crucial importance in relation to the given scenario. The question is whether a breach of contract has been committed when the retailer is selling other products than the products of the established actor, even though an exclusivity clause is not expressly stated in the contract.

The starting point is that the retailer has the right to sell competing products from other actors than the established one, despite competition for the established actor. The duty of loyalty does not include a general competition prohibition.⁵⁸ The contents of the expressly written contract should be decisive. Thus if a contract without a con-competition clause would be interpreted, it would not constitute a breach of contract.⁵⁹ However, if the conclusion after an interpretation of the agreement is that an exclusivity obligation is impliedly agreed upon, it could constitute a breach of contract even though it is not expressly stipulated in the contract. If, for instance, an exclusivity clause is stating that the supplier can only sell products to the retailer it is rather common that the intention is that the clause should concern the retailer as well.⁶⁰ The exclusivity clause needs to be connected to a clause regarding breach of contract, together with legal consequences such as termination of the agreement and damages to obtain a sufficient effect.

The intention of a distribution agreement is usually to establish a long-lasting and loyal relationship. An obligation of loyalty includes an information duty before the agreement is signed in order for the parties not to let themselves be taken in a situation with incorrect expectations. Furthermore the parties should also co-operate through the duration of the agreement. The co-operation includes revealing expected decrease or increase in demand, risks of not satisfying the demand, risks of occurring problems of IPR and marketing

⁵⁸ Ramberg Christina, *Kontraktstyper*, Norstedts Juridik, Stockholm, 2005, p. 248.

⁵⁹ Ramberg Jan and Ramberg Christina, *Allmän avtalsrätt*, 6th edition, Norstedts Juridik, Stockholm, 2003, p. 182.

⁶⁰ Ramberg Christina, *Kontraktstyper*, Norstedts Juridik, Stockholm, 2005, p. 249.

campaigns. There is also an obligation to sell the goods for as high price as possible and actively contribute to a win-win situation. The parties should also contribute to strengthening their reputation on the market as well as confidentiality in relation to trade secrets, know-how, marketing investigations, financial information etc. An obligation of loyalty could also include an obligation of discrimination meaning that for example the retailer should not discriminate the established supplier by benefiting another supplier at the cost of the established one. This obligation depends on the nature of the agreement.⁶¹

2.3.1 Summary in Relation to the Scenario

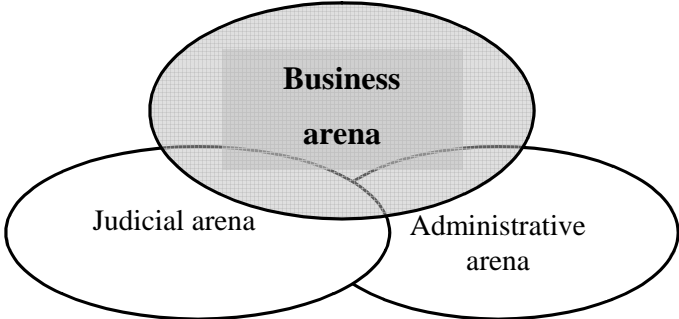
In the given problem scenario there is an evidence difficulty if the exclusivity clause is not clearly stipulated in the agreement. Therefore it will be difficult for the established supplier to prove that the retailer has had an exclusivity obligation if it could not be proven to be impliedly agreed. However, the established actor will have a tough case based on an argumentation of an impliedly exclusivity clause in relation to the given scenario. The supplier would have had a better case if an exclusivity clause were clearly stipulated in the agreement even if it would have been solely directed to the supplier. The exclusivity clause could be interpreted as mutual depending on the contractual circumstances.

A loyalty clause is usually stipulated in the beginning of an agreement as an intention clause and is usually not directly connected to a direct breach of contract and damages. Therefore it is difficult for a supplier to base an argumentation solely on the obligation of loyalty. The clause is indeed crucial as an intention clause although a loyal relationship can in reality not be built upon a clause in an agreement.

⁶¹ Ramberg Christina, *Kontraktstyper*, Norstedts Juridik, Stockholm, 2005, p. 246-248.

3. Practical and Commercial Considerations on the Business Arena

3.1 Introduction



In the following the most crucial legal and commercial strategies will be outlined in terms of preventive actions as well as suggested actions if the scenario has already occurred on the business arena. In the agreement it is important to have push and pull from both parties in order to create a beneficial relationship. Both the new competitor, and the retailer, who purchases the goods, might be close to committing a possible IPR infringement. Thus, the established actor is not satisfied about not receiving a sufficient return of investment if they have invested a lot in a certain product. If the new actor is a free rider, which obviously is entering the scope of protection of an IPR there are legitimate reasons to attack the new actor and perhaps the retailer. However, as discussed above, IPR is about claiming your rights on the business arena, where the actual scope of protection might be uncertain. Hence there might be a thin line between if the established actor is not satisfied due to new competition and whether there in fact is a breach of contract or a clear infringement.

The legal and commercial strategies in the defined situation will depend on the actor in the specific situation. In the following possible strategies with focus on the established actor and the retailer will be analysed since these are the ones most crucial from a distribution agreement point of view. The aim is to apply the relevant law outlined above in a practical context and answer the initial questions in accordance with the following.

3.2 The Established Actor – Preventive Tools

First of all the established actor should make sure to have clear conditions in the contract between the established actor and the retailer, which is mutually important. In order for the supplier to have control of the situation the following preventive issues should be considered.

The established actor should first of all stipulate an exclusivity clause to expressly regulate that the retailer is not permitted to sell competing products. This is also called single branding or a non-competition obligation as discussed above. As long as the supplier has a market share below 30 per cent and the duration of the obligation is maximum 5 years, the *Vertical Block Exemption* stipulates that exclusive distribution is permitted. In case the market share of the supplier exceeds 30 per cent the *Vertical Block Exemption* provide guidance on the relevant analysis, which needs to be made by the supplier including the market position of the supplier, position of competitors, entry barriers, buying power, maturity of the market and the level of trade. The suggested guidelines do not provide a guarantee that the agreement will not restrict competition although the probability of a breach of competition law is low if the supplier and retailer consider them when writing an exclusive distribution agreement.

Furthermore the established actor should include a disclosure clause in the agreement where it should be stated that the retailer has an obligation of disclosing their existing suppliers. Through this clause the supplier will be able to have a clear view of the expectations in the distribution relationship. This is beneficial for both parties since the cards are on the table from the beginning.

In relation to putting the cards on the table from the beginning an information clause should additionally be expressly included in the agreement. A general loyalty clause will not give sufficient consequences in this context. An information clause could oblige the retailer to provide information to the supplier when a competing product is considered to be sold and if there is a risk for an IPR infringement. A duty to inform about other products on the market as well as potential IPR infringement could also be included in the information clause. The relevant IPR should expressly be written in the agreement even if it is not the main object of the agreement. The clarification of the IPR, which is included in the agreement or might be included within a product or service, is advantageous for both parties. If an information clause

is used in a correct manner this could lead to a beneficial relationship. In this context it is crucial to state that a breach of the information clause is also a breach of contract for clarification reasons. A breach of contract clause should be connected to the relevant consequences such as ceasing of the sales, termination of the contract as well as lost of sales and damages.

3.3 Retailer –Preventive Tools

In order to avoid conflicts and to be able to anticipate what the parties can expect from each other it is in the interest of both parties to ensure what has been included in the agreement. A non-competition clause is obviously most beneficial for the supplier. However an exclusive license could be beneficial for the retailer, since the retailer will then be unique by selling the products of the supplier exclusively within a specific market. Therefore the retailer should also clarify what is included within the scope of an exclusivity clause. Thus through a non-competition clause the actions of the retailer could be limited in relation to other suppliers.

If there is a non-competition clause in the contract the retailer is prohibited to sell goods from another supplier and the consequences might be rather severe, including ceasing of sales, termination of the agreement or high damages depending on the conditions in the agreement. In case sales of goods from a new supplier have begun, the sales should immediately be ceased if a non-competition clause is included in the original agreement with the established supplier. If no condition of non-competition, where the retailer is prohibited to sell products of other suppliers, has been agreed upon the sell should be permitted.

The supplier might wish to have a disclosure of what suppliers the retailer has. This obligation could be useful for the retailer as well, since the retailer of the supplier will know what to expect in a potential relationship with the supplier.

In relation to potential information clause the retailer should carefully consider what is included in that obligation and not include unrealistic obligations. The clause should not include a too wide commitment such as to inform of all potential IPR infringements as the retailer might have knowledge of within the market. There are too many interpretations within that type of writing.

3.4 The Established Actor – if the Situation has Occurred

The established actor can mainly use two different legal tools in the given situation in relation to the retailer: the contract law and the IPR together with marketing law. In the given scenario it is not stated expressly in the contract that the retailer has an exclusive right to sell the products. If neither an exclusivity clause nor an information clause expressly is written in the agreement, the main rule is that the retailer is able to sell competing products from other actors than the established actor unless it could be impliedly interpreted. The contract law does therefore not provide a strong case since a loyalty commitment is not a strong tool to build a case of breach of contract around. However if there are circumstances, which could indicate that an exclusivity requirement have impliedly been agreed upon, the possibilities to claim this against the retailer should be investigated.

If a registered or unregistered IPR protection exists and the new actor might have entered the scope of protection another possibility to argue against the retailer is to claim that the retailer has infringed the exclusive right of IPR protection. As long as the supplier has reasonable grounds for the statements of protection and exercise of the IPR this tool should indeed be used. At first sight it might seem easier to have a registered right since the scope of protection is clearly identified by the Patent and Registration Office. Although in reality the need to evaluate the scope of protection is essential no matter if the IPR is registered or not.

Before facing the retailer an investigation of whether the new actor is solely close to or in fact infringing the scope of protection should be made. Nevertheless it is vital to be critical regarding what the scope of protection really can be claimed to include. Thus the risks connected with claiming too much IPR is that the supplier may infringe competition law by making an IPR being the means of restricting competition or exercising it as a lead in an abuse of a dominant position. For example if an actor has a dominant position in operating systems other actors must be able to compete in connected markets and not be excluded due to a copyright. In the Microsoft case other actors were excluded from the market of media players since they did not have the code and money to design them to connect with the

operating system of Microsoft.⁶² The copyright should solely be a copy protection, which in certain cases can extend to be a protection of similar products. Although if an actor has copyright to a code for a specific software it is that code in particular that is protected and not products connected to it.

Furthermore if the supplier claims a far-reaching scope of protection giving the impression of having an IPR without legitimacy, which the retailers are infringing the result could be that the supplier is in breach of the *Marketing Act*. The supplier might be in breach of the rule of good marketing practices stipulated in *Article 4 Marketing Act*. Thus the analysis of the scope of protection is crucial.

3.5 Retailer – if the Situation has Occurred

The retailer, which is approached by the established actor, needs to develop a legal defence strategy on the business arena. First of all the conditions of the contract need to be examined since the retailer does not want to end up in a situation where the contract has been breached. In the given scenario a non-competition clause has not been expressly written in the agreement, which means that the retailer apparently should have the right to sell competing products. However the retailer needs to make sure that the circumstances surrounding the agreement cannot impliedly be interpreted as an exclusive agreement has been established. If the risk of such an interpretation is low the retailer has a fairly strong case in that respect.

Furthermore, as discussed above, even if a loyalty clause has been taken into the agreement this should not be interpreted, as the retailer is excluded to sell solely the goods of one supplier. Instead this could mean that the retailer needs to be faithful to the relationship and the contract as such. Hence if the supplier builds an argumentation on that ground it is rather weak.

Another ground, which the retailer needs to face, is the potential IPR infringement. An investigation of whether the new actor can be considered to have an IPR protection and how wide respectively narrow that protection could be interpreted should be achieved. The investigation should include how strong the case is to argue that the new actor is inside the

⁶² Korah, Valentine, *An Introductory Guide to EC Competition Law and Practice*, 9th edition, Hart Publishing, Oxford and Portland, 2007, p. 121.

scope of protection of the established actor. If the established actor is clearly inside the scope of protection the retailer should watch out and consider ceasing the sales of the new actor immediately. However if it is not obvious that an infringement is committed the retailer should consider whether a counter argumentation is worthwhile.

Additionally a complementary tool to use for the retailer in the context of IPR is competition law and marketing law. In case the established actor is claiming that the scope of protection is wider than it is, this could constitute an infringement of competition law since an insignificant claim of a too wide scope could restrict competition depending on the market and barriers to entry. In case an actor claims a too wide scope of protection it might as well establish a breach of marketing law, since warning letters claiming a protection, where an effort to comprise more than the relevant scope has received damages as discussed above.

The retailer should also investigate how strong the protection is, and the administrative tools in terms of whether the protection meets the fundamental requirements for obtaining a protection. Otherwise it could be possible to invalidate a registered IPR. If for example a trademark does not fulfil the requirement of distinctiveness has not been used one approach can be to claim that the trademark is invalid.

Furthermore the retailer should make an examination to ensure that the supplier fulfils the requirements of competition law. The retailer may be able to defend a potential breach of contract with competition law on the business arena. The retailer should examine that the hardcore restraints as well as the other conditions in the *Vertical Block Exemption* and *Technology Block Exemption* are fulfilled since certain clauses otherwise can be void according to competition law.

The retailer should also ensure that the supplier does not abuse a dominant position. If either of these conditions can be claimed to be shown on the business arena, the retailer might not need to exclusively sell from solely one supplier and can therefore continue the sales. However if a lawyer has been assigned to write the contract the conditions of the contract should appropriately fulfil the requirements of competition law.

3.6 Commercial Strategy

However, even if it is legally possible, the established actor might not be interested in attacking the retailer for commercial reasons. From a business context the retailer is also a potential buyer and perhaps partner since several years, which the supplier might be dependent on and hence might not want to risk the relationship with if it is not necessary. Naturally the level of sensitiveness increases the longer business relationship the actors have had and if the established actor is dependent on the retailer in another context. For example it could be necessary to argue with the retailer if a big stock of products has left the new supplier and this is the essential way to stop the sales. Another reason can be that the new actor exists in a country where the established actor cannot rely on the legal system and its consequences, such as China. If there are few retailers on the market or if this retailer in particular is important, such as Starbucks for coffee in United Kingdom, it might not be worth to argue with this actor. Although the retailer could also have become a competitor, which has taken business ideas from the established actor and then the incentives to attack the retailer is much stronger for the established actor.

Furthermore, if there is a potential infringement of IPR the legal regulations create a possibility to attack any actor, which is entering the scope of protection. However the consequence might be that the retailer becomes restrictive in the relationship with the established actor and might even wish to quit the agreement with both the established actor and the new actor since the retailer might not want to come in the middle of a conflict. As a lawyer it is crucial to interpret how sensitive the relationship between the established actor and the retailer is. The interpretation can then lead to a decision not to attack the retailer at all or perhaps use a sensitive tone in an information letter. In many cases the role of the lawyer is to inform other actors of the existence of an IPR and what it can be claimed to include. According to the ethical rules for lawyers, who are members of the bar association, they shall do everything to help their client at the same time, as they must keep the balance of not extending the scope of IPR protection to include unnecessary elements. The role of the lawyer should not need to be the one who increases the conflict; instead it should be the one who strives to the aim of solving the conflict.

3.7 Cost Efficiency

In a business perspective a crucial aspect is economic efficiency to be able to create as much value as possible. The actions taken will in many cases depend on the financial resources of the company. In context of the scenario cost efficiency for the established actor is usually to try to stop the very source of infringement, which in this case is the new supplier or competitor. However different companies have different strategies depending on what actor to face. For example if it is important for the established actor to cease the sales at once the established actor might want to confront companies on all levels in the distribution chain. Furthermore the choice of which actor to attack will also depend on whether a substantial stock has reached another level in the distribution chain. The place where the infringement or most of the goods is located will be the most efficient way to challenge the infringement. However if it is of interest to attack the retailer, the balance of the *Marketing Act* regarding the scope or protection discussed above, is important to keep in mind.

The incentives to act in the situation will obviously increase if the established actor is losing market shares due to the fact that the new actor has entered the market. Then it might be more cost efficient to act in order to obtain the lost market shares compared to not confronting the infringing actors. Furthermore, as previously discussed, if an actor obtain an IPR and does not act to protect it, the value of the IPR might decrease.

The retailer shall instead evaluate for example, the costs of changing marketing campaigns, as well as the dependency of the goods from the established actor, versus the costs to manage the dispute with the established actor. The possibility to solve the conflict on the business arena is usually more convenient from a cost efficiency perspective since a court procedure usually bring high costs as discussed earlier. Furthermore the parties will establish control of the result of the conflict and will save time as well as engagement.

The new actor should consider the costs for changing the product to get outside the scope of protection of the established actor, including for example production as well as marketing costs, versus managing the conflict as well as risking the relationship with the retailer. Furthermore if the new actor considers changing their product in another way an examination

of the risk to infringe any other IPR should be made. Technology scanning is important when deciding to change the launching of a product with a different approach.

Most cost efficient for the companies is usually trying to solve the conflict between them and involve lawyers in a sensible way. Negotiations where the parties will usually set a price of what the different tools are worth, or make it clear whether it is time to go to court. After a negotiation the most beneficial situation for the companies is usually to go back and focus on their own business since it is on the business arena where they create most value for their businesses. Indeed when it is necessary to protect the IPR one should attack to not lose their value. Although there are many options to manage the conflicts and the strategy does not necessarily need to be an aggressive one. If an actor is aggressive in all actions this will need to be considered in the business arena as well as in the brand building strategy.

3.8 Competition Analysis and Aspects to Consider

Before a conflict takes place with another actor on the business arena, a significant competition analysis should be done to establish the track record of the competitor. There is obviously a difference if the competitor of a company is faced with is a multinational company like Microsoft, which has a lot of resources to spend on a conflict, compared to a small company with lesser opportunities. However, if a small company has a competition dispute with a possible dominant actor, they should consider contacting the Swedish Competition Authority. The threat of contacting them could at least be used as a tool when communicating with the dominant actor on the business arena. The Swedish Competition Authority would indeed be interested in examining a case where there is a suspicion, that a distribution agreement has been terminated, because the retailer has started to purchase goods from a new supplier.

Furthermore an investigation in beforehand might also show whether the company has a carrot or stick approach in relation to solving conflicts, which is useful to know in order to create a strategy to manage them. An analysis whether the company is known as a free rider or in fact a company striving to develop its own path on the business arena is also of interest. Additionally an analysis of the tools at hand should be done in order to find out what type of strategy, which should be used on a specific actor. Certain companies might be difficult to

reach with legal tools and instead commercial tools such as media attention might beat harder on them.

3.9 The Different Tools on the Business Arena

The business arena provides different judicial and administrative tools in relation to the scenario. Therefore it is not strange that the tools of IPR, marketing or contract law are used to solve a competition law issue. The important matter is that the established actor and the retailer establish a decent platform to communicate since they might desire to co-operate in the future. The lawyer usually strives to offer their client the most successful and cost efficient strategies. The subject matter on the business arena is to solve the conflict and which of the tools that are used is less important. If tools of IPR, marketing or contract law are used to solve a problem, which might originally regard competition law, it is appropriate as long as the parties accomplish a settlement and become satisfied.

However it is obviously of importance to have the aim of balancing competition law and IPR/marketing law in a sufficient way. Although the balance is difficult to handle in practice, especially on the business arena, where there is a risk that the fittest actors will survive in many situations. As long as the aims and norms of the legal regulations are fulfilled the balance should not become a problem. Although it is difficult to guarantee a balance on the business arena since it is the actors themselves, who solve the conflicts. Therefore each actor and their lawyers have an individual responsibility in these proceedings.

4. Conclusion

In context of the scenario the new actor could be seen as a free rider infringing the IPR, which try to enter the market without consent from the IPR holder where credit is taken for something they have not created. On the other hand the new competitor might also increase competition by entering the market depending on the market, market power and barriers to entry and shall hence not necessarily be excluded from the market if there is no significant reason. The creators receive carrots in form of IPR to invest in inventions or marketing campaigns, which also increases competition. Hence the IP is not there for selfish purposes

but for the market as such to become even more competitive, which will benefit the customers. However the interpretation of whether an actor is a competitor or a free rider is rather difficult to strike in practice, especially when different commercial interests are at stake.

In relation to the given problem the actions and strategies will depend on what time in the process the lawyer enters the situation. The fact is that the sooner a lawyer enters the situation the better. This is because if a lawyer can be a part of building IPR and competition strategies as well as writing the agreements the company can be prepared on whether or not to take actions. In the beginning it might seem like a lot of additional costs for a company although it can also be considered as an investment in the intellectual assets, which can lead to cost savings at the end. Since the intellectual assets are important for the company it is also crucial to invest in their maintenance.

No matter when the lawyer enters the situation it is crucial to know how to communicate the different tools on the judicial, administrative and business arena. The options of different strategies are usually higher on the business arena. Certain aspects of the tools, which are important on the original judicial or administrative arena, obtain another or are of less importance on the business arena. The tools are used differently depending on whom the actors are communicating to. If the communication is directed to a court, the evidence is of importance in order to have a strong case. The evidence behind the provisions in a competition case such as market definition, market shares on the relevant market, showing that the agreement prevents competition or that an abuse of a dominant position has been committed, are crucial on the judicial arena. However, on the business arena the evidence are of less importance. The judicial and administrative tools could be of use, although since there are other things to consider, as stated above, the focus will instead be on using the legal tools to communicate between the actors. Thus the communication between the actors differs between the different arenas.

In the following a compilation of the different legal and commercial tools will follow.

JUDICIAL AND ADMINISTRATIVE TOOLS	CONSIDERATIONS FOR THE ESTABLISHED ACTOR	CONSIDERATIONS FOR THE RETAILER
The distribution agreement	Make sure that the contract is coherent and clarify the purpose of the co-operation in beforehand. Make sure that the agreement includes carrots and sticks for both parties and let a lawyer write the contract.	Same considerations as the supplier.
Competition Law - Non-competition Clause	A non-competition obligation is beneficial, although make sure that it does not last for more than 5 years, and that the market shares of the established actor does not exceed 30 per cent.	Make sure to clarify what is included in a non-competition obligation and what the consequences are.
Competition Law - Exclusivity Clause	Make sure to clarify what is included in an exclusivity obligation and what the consequences are.	An exclusivity obligation, where the retailer is the exclusive retailer within one market, is beneficial. Although make sure that the market share does not exceed 30 per cent.
Information Clause	An obligation to receive information regarding competing products and IPR infringements are a useful to keep a loyal relationship. Connect the clause to breach of contract and relevant consequences.	Make sure to clarify what is included in an information clause. What is expected from the retailer and is it possible as well as reasonable to provide this information?
Disclosure Clause	The disclosure of existing suppliers is beneficial for reasons of anticipation. Although respect the limits of disclosure of the retailer.	Make sure that you do not disclose information about the partners, which you are prohibited to, or which they do not desire to disclose.
Loyalty Clause	Do not build an entire case on breach of loyalty, which do not have direct consequences in the agreement. Instead, connect the information and disclosure clauses to significant consequences, which will obtain the same effect.	Indeed, it is important to be loyal to a supplier, although it does not include an exclusion of other suppliers, unless a non-competition clause has been included in the agreement.
Breach of contract	Make sure to clarify what a breach of contract incorporates. If there are different levels of breach of contract such as “serious breach of contract” and “breach of contract”, make sure to know the difference and its consequences.	Same considerations as the supplier.
The scope of the IPR and infringement.	Ensure that an IPR protection exists in accordance with the requirements in the IPR regulations and that the scope of protection is reasonably defined. Then a potential infringement can be decided.	Identify the IPR protection of the new competitor and if an infringement have been made. Cease the sell of the goods as soon as possible if this is the case.

JUDICIAL AND ADMINISTRATIVE TOOLS	CONSIDERATIONS FOR THE ESTABLISHED ACTOR	CONSIDERATIONS FOR THE RETAILER
Marketing law - letters	Make sure not to claim an irrelevant scope of protection in the communication with the counterpart, since the consequence could be a breach of the marketing law. There are just a few cases, which have been determined in court, although it is not worth the risk.	Investigate the letters. If an insignificant scope of protection is claimed, it is possible to use that as an argument against the supplier, since this might be a breach of the <i>Marketing Act</i> .
The requirements and validity of the IPR	Make sure that the requirements of the IPR are fulfilled and that the annual fees are paid. Otherwise the IPR might be invalid and this can be used as a tool against the established actor.	Investigate the requirements and annual fees of the IPR. The supplier does not have a strong case if they are not valid or paid.
Marketing Law – distinctive and well-known	Investigate if the product could be claimed to be distinctive and well-known on the market. If this is the case it is a useful argument in relation to the other actors on the business arena.	Critically analyse whether the product could be considered to be distinctive and well-known. Cease the sell of the goods as soon as possible if this is the case.
COMMERCIAL TOOLS		
Dependency of the relationship and Competition Analysis	Examine the dependency of the retailer as well as the resources and behaviour of the retailer in earlier disputes. A dispute with the retailer is not interesting if the retailer is a loyal customer. Additionally, the supplier may be dependent on the retailer in another market, and does therefore not want to risk their relationship.	Same considerations as the supplier.
Cost efficiency	Even if the supplier has a case the financial possibilities are decisive. One should defend the IPR if another actor is infringing it, although issues such as the relationship should be taken into consideration. The source of infringement, or the location of the goods, is usually the most cost efficient way to stop an infringement.	Consider how much the cost is to amend the goods in relation to a potential dispute with the supplier.

All or some of the above tools might become important in relation to the scenario depending on the specific situation. In the perspective of the lawyer it is crucial to create a balance between over- and under-protection of the IPR of the client. Indeed, competition law and IPR are used as different tools on the business arena. However as in any relationship they are created to establish a balance between the early creators and the following ones. Therefore it is crucial to have both carrots and sticks when drafting an IPR distribution agreement.

The possibility to use different legal tools might seem to be endless on the business arena. The aim of the lawyers is to find the most cost efficient and successful tools for their clients.

Therefore it is not strange that tools, which legally seem to be suitable in one situation, are exchanged against other tools, which are more successful and cost efficient. There are a number of legal regulations, which are used to solve a competition law problem in practice. IPR, marketing law or contract law could therefore solve a competition law issue. This is natural behaviour on the business arena, where the mix of different tools is not a problem, as long as the balance between them is kept. However each actor and their lawyers have a responsibility in relation to these solutions.

The actions on the business arenas have been analysed during the thesis. The use of the legal regulations in terms of whether taking actions in court are made with the starting point on the judicial arena. However the legal regulations are originally created on another arena: the political arena. The norms of society are transformed to legal regulations on the political arena. The responsibility of the political arena regarding the tools on the business arena is not quite clear, especially not in the context of striking the right balance between competition law and IPR, as well as marketing law. The legal regulations give the actors many options on how a distribution scenario like the above could be solved, which the actors on the political arena might not be aware of. There is a risk that the intention of the different legislations vanishes if they are used in a way, which is not their intention, since the actors on the business arena strive to solve their conflicts between themselves to as far extent as possible. Indeed the actions on the business arena are efficient, although the risk is that only the fittest actors survive. Therefore, it is crucial that the professional actors on the business arena take their responsibility in context of striking a sufficient balance between the different legal tools.

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