1. Introduction

1.1 Determining how dual distribution systems should be categorised in competition law complaint analysis has been an issue that has been grappled with by competition authorities worldwide. Disseminating products by way of a dual distribution system creates conceptual difficulties as it is a relationship which has both vertical and horizontal dimensions. As the Competition Commission is becoming increasingly vigilant and effective in prosecuting complaints in South Africa, this is an issue that the South African competition authorities also have to consider with greater frequency.

1.2 We are in the fortunate position in South Africa to have a relatively young competition law system which can gain insight from the years of experience in other jurisdictions. At all times however, we must remain cognisant of the differences as well as the similarities between our economy and other economies. This is important in order to develop legislation and case law which reflects the realities of the South African competitive and economic landscape whilst taking into consideration the lessons learned in other jurisdictions and it is for this reason that foreign jurisprudence is also addressed in this paper.

1.3 Dual distribution systems proffer a unique situation in that the same competitive restraints within that system can be viewed as pro-competitive or outright illegal depending on the interpretation adopted towards the relationship between the parties. That is, should they be considered competitors or parties in a supply chain? Each option can have drastically different consequences and therefore an effects-based approach to dual distribution systems is encouraged. Much of the interpretation and analysis of competitive constraints, particularly in the presence of a dual distribution system turns on the delineation of competitive restraints as either vertical or horizontal and consequently this categorisation of conduct is analysed in this paper.

1.4 This paper commences with a consideration of what exactly constitutes a dual distribution system and what impact such a system can have on competition. In most jurisdictions the vertical aspect of the dual distribution system is considered the predominant relationship for the purposes of competition law assessment. Accordingly the development of international competition law in relation to the treatment of vertical

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1 Deneys Reitz. The author wishes to acknowledge and express thanks to Marc Menashe for his invaluable assistance and input in the researching and preparation of this paper. Also thank you to Zania Musson for her helpful comments.

2 Horizontal relationships are those between parties supplying substitutable products or services (actual or potential competitors) and vertical relationships are those which occur between parties occupying different levels of the supply chain, such as a manufacturer and a retailer.
restraints and the move towards an effects-based and more economic approach to competition analysis of vertical practices is reviewed.

1.5 This paper addresses the development of a rule of reason approach to non-price related vertical competitive restraints and considers some of the changing views towards vertical restraints. The manner in which dual distribution systems have been approached in the United States, European Union and Australia is reviewed in order to garner some guidance from the experience in those jurisdictions.

1.6 In drawing a conclusion, emphasis is placed on the importance of analysing the source of the competitive restraint and the effect on consumer welfare in order to obtain more equitable results (if also limiting certainty) than is often achieved through a formalistic classification of conduct as a strictly vertical or horizontal restrictive practice.

1.7 This paper proposes that, in line with modern economic developments and in order to ensure that competition law enforcement does not inadvertently stifle economic development, an effects-based, rule of reason approach is most apposite when tackling issues arising in the context of modern commercial practices such as dual distribution systems.

2. What is a dual distribution system?

2.1 Particularly for manufacturers, one of the most important aspects of their business is to ensure that their products are distributed effectively. It is of little use to manufacture a product that does not reach as many consumers as possible. In addition reduction in production costs is for most manufacturers concomitant with the capacity at which their production facilities are operating. The overheads associated with manufacturing can be extensive and if a factory is running at half its capacity, the costs remain constant but the income to support those costs is halved.

2.2 Consequently it is essential to get product to market in a way that will increase demand for the product and ensure that demand will keep factories running at maximum capacity. In situations such as the recent economic downturn there is little that manufacturers can do to mitigate the impact of decreased demand. However in the ordinary course of business, more effective distribution channels, reaching more end consumers, indeed can improve the demand for products. It is therefore unsurprising that manufacturers will appoint distribution channels for products, such as franchises, wholesalers, retailers and often will also participate in the lower levels of the market to maximise the volume of product in the aftermarket.

2.3 The prospect of reducing or even eliminating even partial reliance on resale intermediaries has an attraction for manufacturers. Eliminating intermediaries can improve supply chain efficiency by allowing upstream parties better visibility into market demand.3

2.4 The situation where the manufacturer simultaneously sells to third party or independent dealers and operates at the dealer level by supplying customers directly is referred to as dual distribution system.4


2.4.1 Dual distribution may take different forms: the manufacturer may operate its own distribution network in competition with other retailers or he may choose to establish an independent exclusive distribution system but will preserve certain territories for his own distribution outlets. In addition a manufacturer can elect to sell directly to large end customers only (particularly where a retailer would not have the capacity or expertise to satisfy that type customer) or as has become increasingly the case, sell directly to consumers over the internet. Dual distribution is particularly common in the American automobile industry, franchising, and internet product sales.

2.5 It would seem a natural conclusion that the more product that is available to consumers the more competitive the market would be. However there are a number of factors that can contribute to competition law difficulties arising out of these sorts of distribution systems.

3. **The competitive impact of dual distribution**

3.1 Entry of an upstream supplier into the downstream market raises at least three interesting points of discussion:

3.1.1 Firstly, and as is the focus of this paper, horizontal restraints on trade imposed by one firm on a competitor are treated as per se illegal. In contrast, vertical restraints imposed by an upstream supplier on its downstream customer often eliminate inefficiencies (such as double marginalization) and therefore may be socially desirable.

3.1.2 Secondly, an upstream supplier can enjoy an artificial cost advantage in the downstream market relative to its non-integrated downstream competitors, where the upstream supplier also enjoys a position of market power this can result in ‘margin squeeze’;

3.1.3 Thirdly, downstream firms may have an advantage over upstream suppliers in dealing with final consumers as they enjoy economies of scale in marketing relative to a manufacturer-owned specialty stores. Moreover, an upstream supplier can also benefit from exploiting the existing facilities of independent distributors and save the cost of entering the downstream market.

3.2 Dual distribution adds a horizontal dimension to the usual vertical relationship that links the manufacturer with independent dealers. In most dual distribution systems the manufacturer competes with the dealers of his network (intra-brand downstream competition) and with all other dealers in the relevant market (inter-brand downstream competition)

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9 This is a situation which arises when both the manufacturer and the retailer/distributor have market power. Because of the market power or dominance of both parties to the supply chain, the supplier can charge the distributor a ‘monopoly’ price and the distributor in turn (as a result of its market position) can then take that price as its cost price and add its own mark up. The result of this is higher prices and less unit sales than there would be in the absence of market power.
10 This aspect is discussed in more detail in the sections below.
11 A margin or price squeeze is a convenient label for some forms of exclusionary abuses by firms in a dominant position involving an interaction between two levels in a supply chain. For more see *Competition Commission of South Africa and Senwes Ltd Case NO: 110/CR/Dec06*
12 Lianos *op cit* at 173.
3.3 It is important, that when considering the competitive impacts of a supplier entering a down stream market that there can also be real differentiating factors between direct supply by a manufacturer to particular types of customers and supply of the same product by dealers or distributors. This is one of the many reasons that analysis of markets in which dual distribution systems operate requires a factual and case by case assessment. It is also worth noting that very different (and far more serious it is submitted) competitive effects can result in a situation where a vertically integrated firm is a supplier of inputs to its downstream entity and also to that entity’s competitors. This is not the same as a dual distribution model and the risk of limitation on competition is far less significant in a dual distribution system.

3.4 Dual distribution systems will also for the most part impact on competition between parties selling the same brand or brands of product (intra-brand competition). Limitations on intra-brand competition can, in certain circumstances, be as damaging for consumer welfare as restrictions on inter-brand competition (competition between parties selling different brands of interchangeable products). The presence of inter-brand competition will often seriously ameliorate any impact that an arrangement to restrict intra-brand competition between a manufacturer and downstream suppliers will have on competition in the market. It is always necessary therefore in the assessment of restrictions within a dual distribution system to consider the market as a whole and the actual impact of the restrictions on competition, both intra and inter-brand to determine whether there are benefits (such as improving inter-brand competition) that outweigh any limitation on intra-brand competition.

3.5 In many commercial relationships between manufacturers or suppliers and their distributors or retailers, it has become common place to include restrictions on the trading of the parties to that relationship, usually through contractual restraints. These sorts of limitations on the commercial freedom of parties are referred to as vertical restraints in competition law analysis. Dual distribution systems can amplify (or mitigate) the operation and effects of vertical restraints.

- **Restraints restricting intrabrand competition**

With regard to vertical restraints that eliminate or limit competition among retailers, the existence of dual distribution could intensify the anticompetitive effect. This is because when
the supplier is also a retailer his incentives are changed in a way that favours less competitive pricing and behaviour on the part of retailers than when the supplier does not operate a retail outlet\(^\text{18}\).

- **Minimum resale price maintenance**

  When the supplier is also a retailer, the profits he makes on account of his retail outlet are those of a retailer. These profits are maximized when the retail price is equal to the cartel price among retailers. This factor could partly offset the supplier’s ordinary incentives to keep the retail price as low as possible, so as to maximize the profits of his supplying outlet. The retail price dictated could be higher than the one a supplier not engaged in dual distribution would dictate. Moreover, the restraint may well be motivated by the supplier’s eagerness to eliminate retail competition so as to raise the profits of his retail outlet.

  In fact, since the supplier competes with retailers in the retail market, he might even inflate the wholesale price more, in order to grant himself a competitive advantage over independent retailers. Gilo argues that this may give the supplier an additional incentive to engage in minimum resale price maintenance (RPM).\(^\text{19}\)

- **Exclusive territories**

  Similarly, exclusive territories imposed by a supplier engaged in dual distribution could be more anticompetitive than exclusive territories imposed by a supplier who does not operate his own retail outlet, if the supplier’s profits include profits per unit and not only fixed fees\(^\text{20}\).

- **Restraint’s limiting the supplier’s entry or operation in the retail market**

  In the same spirit, Gilo argues that any restraints limiting the supplier’s ability or incentive to enter the retail market are actually horizontal in nature\(^\text{21}\). He suggests that these restraints are analogous to a potential retailer committing not to enter or to limit its operations in the retail market and therefore amount to a horizontal restraint similar to a non-compete obligation, which should in his opinion, be viewed harshly.\(^\text{22}\)

- **Exclusive distribution**

  When the supplier commits to a retailer that it will sell only to the latter, but for the supplier’s retail outlet, then dual distribution actually mitigates the anticompetitive harm compared to the case of exclusive distribution absent dual distribution. This is because without dual distribution, consumers in the retailer’s geographic market will have access to the supplier’s brand only in the exclusive retailers’ outlet. In the case of dual distribution, consumers can find the supplier’s brand both in the retailer’s outlet and in the supplier’s own outlet.

3.6 Notwithstanding the above effects on vertical restraints, even where the producer distributes its own products in parallel with other distributors, it does not necessarily increase the producer’s economic motivations to use vertical restraints to minimise competition between distributors. It can be argued that restraints imposed by dual-distributing producers ordinarily have the same function as those imposed by producers generally, provided that the motivation behind the restraint is to benefit the producer directly, rather than the producer’s distribution arm.

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\(^{18}\) Gilo op cit 156
\(^{19}\) Gilo op cit at 23.
\(^{20}\) Gilo op cit at 24.
\(^{21}\) Gilo op cit at 25.
\(^{22}\) United States v Topco Associates 405 US 596 (1972).
Some even argue that the relevant issue is not the existence of vertical restraints at all, but rather the existence of a stable horizontal collusion. In other words, the existence of dual distribution is just as likely to indicate a producer’s attempt to avoid sharing monopoly profits with members of a distribution cartel.

There are, however, a number of real benefits for a manufacturer (and often benefits for consumer welfare too) participating in the downstream market apart from getting a greater volume of product to market and reducing reliance on intermediaries. This is, as it is submitted, one of the primary motivations for international jurisdictions being reluctant to assess restraints within a dual distribution system as *per se* infringements. As listed below, it is apparent that there are some significant pro-competitive outcomes and reasons for utilising a dual distribution system and these, as is argued in more detail below, should not be ignored in any the competitive assessment. Some of these factors indicating the rationale behind a manufacturer’s decision in competing downstream are:

- it offers an opportunity for the manufacturer to monitor the performance of his retailers;
- the manufacturer will be able to prevent free riding, encourage the provision of presale services, protect his reputation, and avoid opportunistic behaviour by the dealers;
- dual distribution also increases the opportunities to serve different types of customers, particularly those that the manufacturer’s regular dealers do not serve;
- intermediaries carry only small assortments of a manufacturer's products;
- direct control of distribution and pricing can lead to higher profit margins;
- intermediaries can use their power to extract various concessions from the manufacturers;
- manufacturers can provide a broader product selection in a better ambiance with higher service in direct outlets;
- more flexibility in experimenting with product attributes;
- closer contact with customers; and
- protection from crises faced by intermediaries.

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24 Lianos *op cit* at 173. Lianos comments “*By being present at the distribution level the manufacturer will be able to collect information on the optimal level and quality of distribution services for the final consumers and will thus take this information into account in order to fine tune his decision to impose vertical restrictions that will provide adequate competitive incentives at the retail level.*”
25 Ibid.
26 Ibid. This is a particularly disputable point as sometimes a manufacturer’s participation in the downstream market is limited to the supply of original equipment manufacturers or large commercial clients who the dealers would not be capable of servicing at the required pricing levels or with the required volume. It is submitted that these sorts of situations offer additional motivation for the treatment of a dual distribution system as being predominantly vertical.
4. Developing a more lenient approach to vertical practices

4.1 At this juncture it is useful to understand how the ‘rule of reason’ approach to vertical restraints evolved and why vertical restraints are typically regarded as having less of a negative effect on competition in a market than similar restraints between parties in a horizontal relationship. This distinction finds its origins in antitrust case law in the United States which was strongly influenced by the Chicago school of antitrust economics. This development in relation to the handling of vertical restraints is discussed briefly below.

4.2 Distinguishing between vertical and horizontal practices is now a pervasive feature of competition law on a worldwide basis and indeed the South African Competition Act also adopts this approach in relation to the analysis of prohibited practices and mergers. In earlier international jurisprudence however, non price related restraints on competition between parties in a vertical relationship were approached on the same per se illegal basis as similar restraints between parties in a horizontal relationship. The South African Competition Act acknowledges that there are situations where both horizontal and vertical arrangements or agreements which purport to restrict competition can be justifiable on the basis of a weighing up exercise. Given the relative youth of our Act, its contents follows on from previous developments in antitrust analysis and economic thinking in other jurisdictions.

4.3 The acceptance of distinct approaches to vertical and horizontal practices arose out of a number of decisions in the 1960’s and 70’s in the United States.

4.3.1 In 1963 the US Supreme Court was reluctant to extend the rule of per se illegality to contractual territorial restrictions imposed by a manufacturer on retailers and displayed an ‘effects based’ reasoning stating that

“we need to know more than we do about the actual impact of these arrangements on competition to decide whether they have such a pernicious effect on competition and lack of redeeming virtue”.  

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4.3.2 Four years later, the court reverted to indiscriminate treatment of horizontal and vertical relationships by extending the application of the per se rule to prohibit restrictions on competition between retailers (intra-brand competition), even if the effect of those restrictions was to enhance inter-brand competition between competing suppliers.  

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4.3.3 It was ten years before the decision was overturned in Sylvania where it was held that vertical customer and territorial restrictions should instead be assessed under the rule of reason.

4.3.4 Lianos explains the change in direction by the US Supreme Court as being motivated by the

“joint influence of the Chicago school of antitrust economics, which recognizes the role of interbrand competition and market power as filters to antitrust enforcement, and new institutional economics, which draw attention to the economic motives of vertical contractual integration.”  

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29 United States v Arnold, Schwinn & Co 388 US 365 (1967). In this decision US Supreme Court expanded the scope of the per se rule to apply to vertical restrictions relating to customers and territories.
31 Lianos op cit at 163.
4.4 According to Verouden, the Chicago School has two main focuses:

4.4.1 Firstly, it concentrated on the motivations of companies using the restraints, asking the question, why do rational companies in a competitive situation consent to restrictions on their commercial behaviour?  

4.4.2 Secondly, it posited that economic efficiency (welfare) should be the main standard for antitrust analysis.

4.5 This move to analyse vertical restraints on a rule of reason basis has since been adopted the world over and has significant and far reaching consequences, not the least of which is highlighted by Lemley and Leslie. They note that because the Court explicitly reaffirmed the applicability of the per se rule regarding territorial and customer restrictions on a horizontal basis restraints, it increased the stakes in categorising conduct as horizontal or vertical considerably.

4.6 The practical application of the Chicago School way of thinking however, has not always had consumer welfare as the primary consideration and there has sometimes been a blithe acceptance that a vertical arrangement is simply less damaging without an actual consideration of the impact of that arrangement on welfare. There is a developing trend, some 50 years after the peak of the success of the Chicago School, to question and consider vertical restraints more carefully and some who argue that vertical restraints can be as damaging to competition as horizontal restrictions.

5. Vertical restraints less harmful to competition?

5.1 Lemley and Leslie note

“If a restraint is horizontal, then courts are more likely to condemn it under the per se rule. This saves time and resources because such horizontal restraints are likely or almost always likely to reduce competition in a manner that antitrust cares about, while vertical restraints often serve legitimate business purposes.”

5.2 One of the major differences acknowledged in the European Commission’s Guidelines on Vertical Restraints is the differing incentives that that parties have to coordinate their conduct. In these Guidelines it is stated:

33 Ibid. Verouden states “The Chicago School emphasized that agreements concluded by companies in a vertical relationship are, by their nature, very different from horizontal agreements. The fact that the former are agreements concluded between companies that both fulfil an indispensable function in putting the product on the market suggests that they are primarily used to make the vertical combination more efficient. After all, in a vertical relationship, when one party does a poor job in satisfying consumer demand, this will not only affect the consumer but also the other trading partner. Through this special interdependent relationship, every party in a vertical agreement can, in principle, be considered a natural ally of the consumer.”
34 The expression ‘vertical restraints’, namely a vertical agreement found to infringe competition law, was applied for the first time in Motor Co v Webster Auto Sales 361 F 2d 874 (1st Cir 1966) for non-price and price-related vertical practices
36 Lemley and Leslie op cit 1232
“Vertical restraints are generally less harmful than horizontal restraints. The main reason for being less concerned about a vertical restraint than a horizontal restraint lies in the fact that the latter may concern an agreement between competitors producing identical or substitutable goods or services. In such horizontal relationships the exercise of market power by one company (higher price of its product) may benefit its competitors. This may provide an incentive to competitors to induce each other to behave anti-competitively. In vertical relationships the product of the one is the input for the other, in other words the activities of the parties to the agreement are complementary to each other. This means that the exercise of market power by either the upstream or downstream company would normally hurt the demand for the product of the other. The companies involved in the agreement therefore usually have an incentive to prevent the exercise of market power by the other.”

5.3 This rationale is particularly true in the case where the supplier’s profit is couched in the wholesale price to the retailer; in order to ensure maximum profit (commensurate with number of units sold) it is in the supplier’s interest for their retailers to be competing vigorously. Competition would increase the number of units sold, thereby elevating the supplier’s profits. Gilo notes that such a supplier would be interested in the retailers providing optimal services. As for the retailer, since his profits are typically rising when the supplier’s power to raise prices is limited, the retailer too would not want to engage in a restraint which enhances the supplier’s market power.

5.4 Gilo also identifies another reason for the comparatively lenient approach adopted in competition law towards vertical restraints. He notes that for the most part, it is unnecessary for a supplier to have to impose vertical restraints to increase profits or the retail price of a product. He states “All the supplier needs to do is elevate the wholesale price he charges his retailers. This would inflate their marginal costs, thereby compelling them to raise the retail price.” Consequently, it is not always the restraints themselves that will result in higher prices.

5.5 It is for inter alia these reasons therefore that vertical restraints agreed on by suppliers and retailers can often be explained by the need to alleviate inefficiencies in distribution or supply. There are a myriad of reasons for the imposition of restraints by manufacturers on their distribution channels and some of these include free riding, justifying supplier expenditure on channel advertising, inventory decisions, information difficulties or other externalities between the parties causing them to have inadequate incentives to efficiently promote the product absent the vertical restraint. Lianos notes that parties will often use vertical contracts in order to align their incentives.

5.6 The EU Guidelines acknowledge that vertical restraints may have benefits to consumers and to this end include a non exhaustive list of possible justifications for particular vertical restraints. They do however caution that the self regulating nature of

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38 EC Guidelines op cit at paragraph 98.
40 Gilo op cit at 142.
41 Gilo op cit at 141.
42 Gilo op cit 143.
43 Lianos op cit at 164.
vertical arrangements should not be over-estimated and there are some significant negative effects on competition that can result from vertical restraints.  

5.7 In South Africa, as in many other jurisdictions, vertical restraints are generally viewed as having a less negative effect on competition than the restrictions between competitors. The Competition Act addresses complaints based on restrictive practices between parties at different levels of the supply chain on a rule of reason basis (apart from RPM which is prohibited on a per se basis.) This approach acknowledges that there are situations where vertical restraints will have as their motivation something other than restricting competition (and therefore elevating prices and diminishing consumer welfare) and will often have pro-competitive, technology or efficiency gains which will outweigh any negative impact on competition. 

5.8 Nonetheless, while the last few decades have increasingly recognised the beneficial effects of vertical restraints as methods of efficient organisation of chains of production and distribution, there has also been extensive criticism aimed at the fact that vertical restraints are automatically accepted as being less problematic than horizontal restraints, and this criticism has been particularly aimed at the European Union’s block exemptions applying to vertical restraints.

5.9 In contrast to both the distinction drawn in our Competition Act and the European Union’s block exemptions applying to vertical restraints, the Australian authorities tend to take a far more holistic approach to vertical restraints which does not view vertical restraints as generally worse or better than horizontal restraints.

5.10 In Re AGL Cooper Basin Natural Gas Supply Arrangements, the Tribunal’s view (recognising that in a concentrated economy vertical restraints can be as problematic to consumer welfare as horizontal ones) was that:

“...a generalisation [that vertical contracts are innocent of anti-competitive effects in almost all circumstances] may be defensible for wide and open markets, as they occur in the US, but cannot be applied generally in Australian conditions. For small markets, containing very few contestants (as in the present matter), and with large capital investments in relation to the size of the markets concerned, vertical agreements can have a market foreclosing effect.”

5.11 In Australia, markets are relatively small and concentrated. This may justify particular importance being placed on the protection of the competitive process, as opposed to the approach of the Chicago School, which would generally look first to the outcome of allocative efficiency rather than the means by which it is achieved.

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45 Most notably the European Union which exempts certain vertical agreements from competition law analysis, the block exemption has been revised this year to accommodate some changes in thinking about vertical restraints. 
46 This opportunity is also allowed under section 4(1)(a) of the Act for competing respondents facing an allegation that they have engaged in restrictive practices which do not fall within the hard core cartel activities described in section 4(1)(b) of the Act. 
48 1997 ATPR ¶41-593, 44,217
competition law aims to focus on promotion of a competitive market structure on the assumption that such a structure will result in maximum allocative efficiency, if only perhaps for the benefit of consumers rather than society as a whole.

5.12

The primary importance placed on competitive markets is reflected in the dual adjudication system in which vertical restraints are assessed by the courts to determine whether they are per se prohibited or substantially lessen competition, and then by the Commission and the Tribunal to see whether there are public benefits associated with the restraints that outweigh any anti-competitive detriment. 49

5.13

The approach adopted by the Australian authorities to vertical restraints aligns neatly with a theory posited by Robert Steiner who argues that the processes of horizontal and vertical competition are virtually equivalent, as are the market power effects of being a highly successful horizontal or vertical competitor. 50

5.14

Steiner challenges the Chicago school of thought on vertical restraints and in particular that the interests of parties in a supply relationship are complementary. 51 Steiner contends that there are two forms of competition that co-exist in vertical structures. Firstly there is horizontal competition between the different vertical structures or between the retailers of the same vertical structure, and secondly, there exists vertical competition between the different levels of the supply chain for their share of the profits within the supply chain. 52 Steiner observes competition as a struggle between firms aiming to capture a perceptible share of markets from each other (the traditional view of horizontal competition) but also importantly for a share of sales or margins. 53 Steiner posits that the view of vertical restraints which focuses on inter-brand competition and often ignores the impact on intra-brand competition does not ‘reflect the commercial reality’. 54 The dual stage model, he suggests, will not only focus on the existence of market power at each level and/or horizontal competition between suppliers or between dealers, but will also examine competitive relationships between manufacturers and retailers. 55 Lianos comments that “the major implication of Steiner’s approach is the proposition that competition law should shift from the static analysis of the existence of horizontal market power to that of negative effects on consumers, following the exercise of horizontal and/or vertical market power”. 56 Lianos argues that this analysis

49 D Clough “Law And Economics Of Vertical Restraints In Australia” [2001] MULR 20
51 Verouden states that such complementarity is most apparent in the interdependence between production and distribution:when a producer produces a good, the only way the product can reach the market is through some form of distribution. Likewise, each distributor is dependent on the supply of products by producers. P Seabright “Competition Policy Towards Vertical Restraints: Implementable Rules for Competition Authorities”, in Competition Policies in Europe 161, 175 S Martin (ed), (1998). Verouden notes in citing Seabright that each firm producing complements has a private incentive to influence the price charged by another company in a direction (downward) that improves both consumer surplus and welfare. The private and the social incentives are aligned. Verouden op cit at 1816.
52 The accuracy of this analysis is confirmed in M P Lynch, “Why Economists are Wrong to Neglect Retailing and How Steiner's Theory Provides an Explanation of Important Regularities” [2004] 49 Antitrust Bulletin 911.
53 Lianos op cit at 168.
54 Lianos op cit at 171.
56 This point is reflected to some extent in the EU’s revised block exemptions which sets market share thresholds of below 30% for both the supplier and the retailer for the exemption to be applicable. This amendment is still, however, subject to criticism as it is almost impossible for a manufacturer to know what its distributor’s market share is unless the arrangement is one of exclusive distribution (as this will in all likelihood reflect the market share of the manufacturer), in which case, it will fall outside the exemption. For more see P Lugard and T van Dijk "The New EC Block Exemption for Vertical Restraints: A Step Forward and a Missed Opportunity" [2010] 6 Antitrust Chronicle available at https://www.competitionpolicyinternational.com/internet-sales-and-the-new-eu-rules-on-vertical-restraints; I Lianos "New Kids on the Block: Retailer-driven Vertical Practices and the New Regulation of Vertical Restraints in EU Competition Law" [2010] 6 Antitrust Chronicle available at https://www.competitionpolicyinternational.com/new-kids-on-the-block-retailer-driven-vertical-practices-and-the-new-regulation-of-vertical-restraints-in-eu-competition-law/.
recognizes that the processes of horizontal and vertical competition are similar and they should have an equal importance in competition law assessment. This further aligns with Lianos’ view, which it is submitted is particularly well placed in relation to restrictive practices which can occur in the dual distribution situation, which is that “distinguishing between horizontal and vertical restraints or between interbrand and intrabrand competition does not always operate smoothly as a shortcut for anticompetitive or pro-competitive effects”.57

5.15 There is insufficient scope in this paper to adequately address all the differing theories of harm that have arisen in recent decades in relation to vertical practices, save to note that most economists take the view that a prediction of the competitive and welfare effects of vertical restraints out of the context in which they are applied is impossible.58 However what is apparent is that vertical restraints can be both pro and anti-competitive in effect and it is the effect that needs to be focused on. There is also increasing support for the importance of considering the effects59 of particular conduct rather than defining it as necessarily horizontal or vertical conduct to determine the appropriate treatment.

5.16 Verouden notes that there has been a move away from the traditional Chicago view to the advocacy of a more explicit balancing test, based on the circumstances of each case. Kay states “the best conclusion is that we should principally look at the consequences, rather than the form or first order effects of the restraints”.60 The difficulty with this analysis is, as Verouden comments, this approach is sound in economic theory but is far too burdensome for competition authorities and courts.61 He is therefore a proponent of the approach adopted in the EU of providing guidance regarding the circumstances in which vertical restraints are likely or unlikely to have detrimental effects is therefore necessary to allow for antitrust supervision that is not only effective but also efficient in keeping down enforcement costs.

5.17 This is certainly the approach adopted in the EU, and understandably so given the size of the economy affected by the European Commission’s jurisdiction and the need to provide some certainty to avoid inhibiting business models that historically (through repeated analysis) have been shown not to cause harm to competition or consumer welfare. In South Africa, however, the wording of the Act in relation to vertical restraints (but for minimum resale price maintenance) and the absence of guidelines or exemptions in relation to vertical practices does provide some scope for the employment of a more case by case analysis and effects based consideration of practices. Such analysis does however still ride on the classification of practices as either vertical or horizontal. Therefore we now turn to consider whether restraints within

57 Lianos op cit at 171.
58 Verouden loc cit.
59 A move away from the assumption that conduct is better or worse depending on whether it is horizontal or vertical is similar to the changes in thinking posited by economists in relation to the use of market definition and market shares as determinant of the outcome of a merger. Indeed in America, the shift to a real effects based approach is apparent in merger analysis too. The Federal Trade Commission’s (FTC) and Department of Justice’s (DOJ) revised Horizontal Merger Guidelines published on 19 August 2010 continue the trend away from the use of market shares and market definition as a predictor of post-merger effects, the guidelines comment that market share calculations are only useful ‘to the extent it illuminates the merger’s likely competitive effects’ and that “some of the analytical tools used by the Agencies to assess competitive effects do not rely on market definition. As economic modelling and our understanding of market dynamics becomes increasingly sophisticated, it is submitted that the traditional reliance on defining markets and restrictive practices as horizontal and vertical will appear rudimentary tools for analysis of effects on competition. The 2010 guidelines are available on the FTC’s website at http://www.ftc.gov/os/2010/08/100819hmg.pdf and the Department of Justice’s website at http://www.justice.gov/atr/public/guidelines/hmg-2010.html.
61 Verouden loc cit.
a dual distribution system should properly be considered as horizontal or vertical restraints and indeed whether such classification is necessary.

6. Dual distribution- horizontal or vertical?

6.1 Lianos refers to the dual distribution system as a ‘hybrid relationship’ and notes that it has confounded competition law authorities and courts, as it is challenging to decide whether the horizontal or vertical dimension should prevail so that the agreement may be characterised as being vertical or horizontal. For example, the supplier’s suggestion of a resale price and the retailer's acceptance of that suggestion may be qualified as horizontal price fixing, as the supplier and the retailer are also in direct horizontal competition or alternatively, territorial restraints imposed by the supplier in a dual distribution system could be construed as market allocation.

6.2 As this is an issue that fascinated competition law enforcers and adjudicators for some years, it is worth considering the approaches adopted by some international jurisdictions towards dual distribution systems in order to obtain some guidance for its assessment in South Africa.

7. International approaches to dual distribution systems

7.1 The American approach

7.1.1 When the issue of dual distribution first started arising in the American courts, the primary consideration for antitrust analysis was the horizontal relationship between the manufacturer and its wholesalers/distributors/retailers. As restraints between parties in a competitive relationship are *per se* illegal, restraints by a manufacturer on its downstream wholesalers/retailers/distributors in a dual distribution situation were therefore also considered by the authorities and courts as *per se* illegal.62

7.1.2 However, as courts gained experience with dual distribution during the 1980s they concluded that the vertical character predominates and removes dual distribution from the horizontal or *per se* characterization.2 Since then, courts have been able to resolve the horizontal/*per se* vs. vertical/rule of reason debate as a matter of law.63

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62 This can be seen for example in the case of United States v Sealy Inc 388 US 350 (1967) where territorial restraints between the licensor of a trademark and its licensees was viewed as a vertical restraint by the trial court and consequently accepted as a justifiable and reasonable. The Supreme Court however characterised the same arrangement as a horizontal restriction and accordingly *per se* prohibited.

63 Electronic Communications Corp. v. Toshiba America Consumer Products, 129 F.3d 240, 243 (2d. Cir. 1997) wherein it was noted (“[V]ertical restraints are generally subject to ‘rule of reason’ analysis. . . This is so even if the distributor and manufacturer also compete at the distribution level.”) In Midwestern Waffle v. Waffle House 734 F. 2d 705 (11th Circuit 1984) the Appeal Court held that: “… it might be considered that a dual distributorship exists in the case at bar….There is an emerging tendency by the courts to view the primary relationship between a dual distributor and an independent franchisee as vertical where the restrictions do not lessen inter-brand competition or decrease the availability of goods or services.” and similarly Diamond v. Liquid Carbonic Corp 637 F. 2d 1001 (5th Circuit 1981), the Court of Appeal held: “When a distributor elects to market its goods through distributors, the latter are not, in an economic sense, competitors of the producer even though the producer also markets some of its goods itself; rather the distributors are “agents” of the producer, employed because the producer has determined that it can supply its goods to consumers more efficiently by using distributors than it can by marketing them entirely by itself.”
7.1.3 The matter of *Krehl v. Baskin-Robbins Ice Cream Co.*\(^6^4\) summarises the US Court’s more developing attitude to dual distribution. In this case, certain franchisees contended that the "dual distribution" system used by Baskin-Robbins constituted an unlawful horizontal market allocation. Further, the franchisees argued that any "dual distribution" system is, in and of itself, a *per se* violation of the antitrust laws. The Court of Appeal disagreed and held that "in the absence of proof of anti-competitive purpose or effect, dual distribution systems must be evaluated under the traditional rule of reason standard." The Court in the more recent case of *Spahr v. Leegin*\(^6^5\) noted that a *per se* analysis is appropriate, and a vertical restraint can be characterized as horizontal, *only* where the source of the conspiracy is a combination of the distributors.

7.1.4 The American courts usually conclude that the distribution restraint should be governed by the rule of reason because either (1) the manufacturer acted unilaterally as the source of the restraint, or (2) the restraint’s purpose and effects are identical to those associated with restraints imposed by manufacturers that are not dual distributors.\(^6^6\)

7.2 The European Approach

7.2.1 One of the primary motivations for treating a dual distribution under provisions in legislation relating to vertical restraints is that whilst the parties in the relationship may operate broadly in the same broad product market, there are significant differences between a manufacturer engaging in direct sales (but this is often distinguishable from the situation when the manufacturer owns downstream dealers) and the types of sales engaged in by independent dealers. There are a number of factors that highlight differences between distribution sales from the production and direct sale of these products. Particularly in relation to the steel industry the European Commission\(^6^7\) has differentiated these sales channels based on the following factors:

- **The diversity of its customers:** The purchasers of products from the standard distribution channels are usually different customers, with different needs, when compared to the customers associated with direct sales. Manufacturers often only serve a limited number of large customers while distributors generally service a much wider variety of smaller customers. Due to these scale economies it may be efficient for a manufacturer to supply product directly to these customers.

- **The smaller size of orders:** Sales from manufacturers to the final consumer are typically of a much larger quantity than the sales from distributors to end consumers.

- **The ability of distributors to respond rapidly to customer requirements:** Delivery times from manufacturers are usually significantly longer than that of distributors. The lead times for ordering product from the manufacturer is often significantly longer compared to that of distributors. Thus, unlike distributors, manufacturers cannot easily and quickly respond to demands of customers which are often customised. As such direct sales can generally be characterised as those for which demand is predictable and known well in advance. Also

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\(^{64}\) 664 F. 2d 1348 (9th Circuit 1982)

\(^{65}\) *Spahr v. Leegin Creative Leather Products, Inc*, 2008 WL 3914461 (E.D. Tenn. 2008); See also *International Logistics Group, Ltd. v. Chrysler Corp*, 884 F.2d 904 (6th Cit. 1989) and *Red Diamond Supply, Inc. v. Liquid Carbonic Corp* supra.

\(^{66}\) Lianos *op cit* at 174. Lianos gives the following example: a dual distribution system allows the manufacturer to engage in price discrimination, which in some cases may be beneficial to consumers. *De facto* discrimination could, however, also be achieved without employing a dual distribution practice. It would be possible to impose intra-brand restraints on independent dealers and maximum resale prices or to charge all dealers the same price and provide a rebate on re-sales to specific categories of consumers. "There is no reason to examine dual distribution differently from other vertical restraints, as the same effects may be similarly achieved by more conventional vertical distribution practices."

\(^{67}\) See for example Case No COMP/M.4225 – *Celsa Group / Fundia Reinforcing AS*
manufacturers may not operate extensive national distribution networks (including local representation).

- **The local nature of its business**: distribution outlets generally serve customers within a limited distance from their location.
- **The large number of companies involved in distribution**: there are generally a large number of distributors, including integrated distributors owned by manufacturers and independent distributors.

7.2.2 In adopting this analysis of the markets in which the distributor and the manufacturer engaging in direct sales operates indicates that the manufacturer and distributor, even in operating in the market sales of the same product, this does not mean that they are necessarily competing with one another. Areeda and Hovenkamp\(^\text{68}\) argue that it is inappropriate to treat manufacturers that supply to end customers and distributors as necessarily being in a horizontal arrangement for the purposes of competition analysis. It is in this context that Areeda and Hovenkamp argue that it is preferable that the manufacturer and distributors in a relationship characterised by dual distribution to be treated as being in a vertical relationship.

7.2.3 **The EU Block Exemption**

7.2.3.1 In April 2010, the European Commission adopted a new block Vertical Restraints Block Exemption Regulation\(^\text{69}\) covering distribution and supply agreements. From June this year, these EU block exemptions automatically exempt certain types of vertical agreements from the general ban on anti-competitive agreements in the EU.

7.2.3.2 Essentially, companies are free to decide how and on what terms to distribute their products in the EU, provided their agreements do not contain hardcore restrictions and the market shares of the supplier and buyer both do not exceed 30%. In terms of these "hardcore" restrictions, some examples would be:

i. the restriction of active sales into the exclusive territory or to a customer group reserved to a supplier or allocated by the supplier to another buyer, where such a restriction does not limit sales by the customers of the buyer;

ii. the restriction of sales by the members of a selective distribution system to unauthorised distributors in markets where such a system is operated;

iii. any obligation causing the members of a selective distribution system not to sell the brands of particular competing suppliers.

7.2.3.3 In its Guidelines on Vertical Restraints\(^\text{70}\), the Commission expands on the scope of the Block Exemption Regulation. According to its definition, a "vertical agreement" is "an agreement or concerted practice entered into between two or more undertakings each of which operates, for the purposes of the agreement or the concerted practice, at a different level of

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the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services”.

7.2.3.4 Article 2(4) of the Block Exemption Regulation explicitly excludes from its application “vertical agreements entered into between competing undertakings”. Vertical agreements between competitors are dealt with, as regards possible collusion effects, in the Guidelines on the applicability of Article 101 to horizontal cooperation agreements. However, the vertical aspects of such agreements need to be assessed under these Guidelines.

7.2.3.5 The Block Exemption Regulation and EC guidelines do acknowledge however that dual distribution should be treated differently from vertical agreements between competitors as excluded in Article 2(4) of the Block Exemption Regulation, which reads, “practically, two companies are treated as actual competitors if they are active on the same relevant market. However, Article 2(4) of the Block Exemption Regulation contains two exceptions to the general exclusion of vertical agreements between competitors. The EC Guidelines elaborate on the particular exceptions in the Block Exemption Regulation71:

“These exceptions concern nonreciprocal agreements. Non-reciprocal agreements between competitors are covered by the Block Exemption Regulation where

(1) the supplier is a manufacturer and distributer of goods, while the buyer is only a distributor and not also a competing undertaking at the manufacturing level, or

(2) the supplier is a provider of services operating at several levels of trade, while the buyer operates at the retail level and is not a competing undertaking at the level of trade where it purchases the contract services.”

7.2.3.6 The EC Guidelines go on to explain these exclusions in order to provide further clarity.

“The first exception covers situations of dual distribution, i.e. the manufacturer of particular goods also acts as a distributor of the goods in competition with independent distributors of his goods. In case of dual distribution it is considered that in general any potential impact on the competitive relationship between the manufacturer and retailer at the retail level is of lesser importance than the potential impact of the vertical supply agreement on competition in general at the manufacturing or retail level. The second exception covers similar situations of dual distribution, but in this case for services, when the supplier is also a provider of products at the retail level where the buyer operates.” (own emphasis).

7.2.3.7 The EC’s approach to dual distribution has been criticised primarily on the basis that it is too inclusive and lenient in relation to dual distribution but does not provide exemptions for, in those authors’ views, far less problematic vertical arrangements that have elements or horizontal relations such as private labels.72

71 Ibid at Para 28.
72 Also, Lianos argues that these EU regulations “apply only in situations where the undertakings are competing distributors, for example independent retailers competing with supplier-owned outlets, but does not cover the situations
7.2.3.8 It is submitted, however that these new regulations and the accompanying Guidelines offer a highly equitable approach and understanding of the need that firms have to participate in different levels of distribution (often with pro-competitive effects) and that these situations should not be treated in the same manner as hard-core restrictions between competitors. Furthermore the inclusion of market share thresholds (despite the criticism that many economists level at the use of market shares as an indication of competition concerns) at both the supplier and retailer level acknowledge the commercial reality that it is no longer always the case that the seat of power in these sorts of relationships rests solely with the supplier.

7.3 Australian approach

7.3.1 Restraints within a dual distribution system are viewed primarily as vertical restraints for Competition law analysis in Australia.73

7.3.2 As mentioned above, Australia adopts a dual adjudication system whereby vertical restraints are assessed by the courts to determine whether they are per se prohibited or substantially lessen competition, and then by the Commission and the Tribunal to see whether there are public benefits associated with the restraints that outweigh any anti-competitive detriment.

7.3.3 Dual distribution was considered in the Australian context of vertical restraints in the matter of BMW Australia Ltd.74 Here, the Commission considered the requirement imposed by BMW on its prospective dealers that they enter into a dealership agreement with Rover and sell its vehicles. The Commission considered the requirement to be anti-competitive, in so far as it would impact adversely on dealers' demand for competing vehicle franchises in the limits it imposed on dealers' capital resources and their ability to achieve an optimum mix of vehicle franchises. The Commission was not convinced that there were synergies or cost efficiencies in operating dual distributorships that would improve economic viability to any significant extent. In any case, the Commission was of the view that if the efficiencies existed they would have come about in the course of competition. The Commission noted that better product placement was a private commercial goal rather than a public benefit.

8. Why horizontal and vertical categorisation is unnecessary for dual distribution

8.1 Characterising an arrangement as either vertical or horizontal has significant impact for those defending themselves against allegations of competition law infringements. As Lemley and Leslie comment “Calling a platypus a mammal doesn’t change the fact that it lays eggs. But calling a particular competitive practice by one name or another often has dramatic consequences for whether or not the law permits it.”75 The limitations of categorisation of conduct or relationships as either vertical or horizontal are particularly apparent in relation to dual distribution.

where the supplier and the retailer are competing manufacturers. This excludes from the scope of the block exemption situations where the retailer sells private labels that compete with the national brand of a supplier, except in [some] circumstances” Lianos op cit at 184. Private label products or services are typically those manufactured or provided by one company for offer under another company’s brand.
73 Clough loc cit.
74 [1998] ATPR (Com) ¶55–001.
8.2 As is evident from the discussion above, this has been a vexed question, particularly in American jurisprudence. Despite the fact that it had been noted that dual distribution systems should be analysed on the basis of economic effects, Zwirb comments that "[I]n cases decided after Sylvania, the legality of [dual distribution] restraints turned upon a determination of whether they were ‘vertical’ or ‘horizontal.’ He continues by stating that “By concentrating on the form of the distribution arrangement involved, most decisions fail to evaluate distribution restraints on the basis of economic effect.”

8.3 Restricting the commercial freedom of retailers may have, depending on the circumstances, a positive or a negative welfare effect for consumers. As indicated throughout this paper, the distinction of conduct as either horizontal or vertical can be an artificial construction that does not necessarily recognise the nuances of modern commercial practices. Lianos notes in relation to dual distribution agreements,

“uncovering the vertical or horizontal nature of the restriction constitutes an unnecessary intermediary step in the analysis, as the classification does not bring any particular information on the existence of those anti-competitive effects.”

8.4 It is submitted that one of the major reasons that dual distribution systems have been viewed throughout the world as primarily vertical relationships, is because of the development of a more reasoned approach to vertical restraints and the recognition that vertical restraints can have both positive and negative effects on competition. A dual distribution system will never fit neatly into the vertical or horizontal categories employed in competition law analysis as there are elements of both relationships. Considering the relationship as a predominantly vertical one does, however, allow for the opportunity to assess the real economic effects of the restraints within that relationship.

9. A proposed methodology for South Africa

9.1 Parties utilising a dual distribution relationship in South Africa are faced with the difficulty that when restrictions are imposed by a manufacturer on its downstream dealers, if those restrictions are considered under section 5(1) of the Act, there is an opportunity for justification. The same conduct, however, if viewed as restrictions between parties in a horizontal relationship will rarely fall under the rule of reason analysis allowed in section 4(1)(a), particularly a restriction such as exclusive territories, but rather they will be considered as alleged contraventions of section 4(1)(b) which is judged on a per se basis and allows the parties no opportunity for proving any pro-competitive, efficiency or technological gains that may outweigh any negative impact on competition.

9.2 The Competition Tribunal has not yet had an opportunity to make a finding in relation to restraints imposed within a dual distribution relationship. However there are two complaints which have been referred to the Tribunal which address this very issue. In both instances the relationship between the manufacturer and its distributors has been cast as a competitive on and consequently the complaint is brought under section 4(1)(b), and consequently on a per se basis. If all dual distribution arrangements are to be assessed on this basis, it is submitted that this will have a chilling effect on often legitimate and pro-competitive distribution systems used by manufacturers.

77 Lianos loc cit
9.3 Practitioners are often at a loss as to what to advise their clients wishing to employ a dual distribution system for their products. If restraints imposed within these systems are considered as collusive arrangements, businesses will opt not to employ such a system (which may be perfectly legitimate or justifiable on a rule of reason analysis) distribution system because of the possibility of competition law exposure, which no opportunity to justify the restraints. In addition a cautious approach should be adopted in relation to decreeing how businesses elect to distribute their products when methods used could have pro-competitive benefits.

9.4 As has been demonstrated in this paper there are many sound reasons for entering into a dual distribution system and indeed pro-competitive (as well as anticompetitive) consequences can flow from these arrangements. It is apparent that not all agreements or practices between competitors (apart from the outright prohibited conduct) are on balance anticompetitive. Non price related vertical restraints, in particular (and especially when coupled with a dual distribution system) cannot be viewed in isolation and call for a careful consideration of factors such as, the degree of market power exercised by the supplier and the retailer, the source of the restraint, the relative strength of inter and intra-brand competition and the nature of the market itself can all be determinate of whether restraints will impact positively or negatively on consumer welfare.

9.5 Another difficulty that arises in defining restrictions in a dual distribution situation as horizontal (and for the most part hard-core restrictions) is that fact that the restrictions will only affect intra-brand competition and may well improve inter-brand competition between manufacturers and these factors are not properly ventilated when the conduct is assessed under a provision using the per se analysis.

9.6 A consideration of the differing spheres of competition affected by the conduct is vital for reaching an equitable decision. It is very important that the total effect on the market be considered to determine whether restraints in a dual distribution system are really problematic at all. Analysing restrictive practices in a dual distribution situation on per se basis does not allow for this consideration and can therefore inadvertently result in an unnecessarily harsh finding where, if determined under a different section of the Act, could have an entirely different outcome. The balancing of the magnitude of competitive effects calls for a structured rule of reason approach to weigh the evidence and evaluate the impact of restraints for economic welfare.

9.7 It is submitted that there is nothing in the Competition Act which prevents such an approach. The Competition Act allows for the rule of reason analysis in relation both to horizontal and vertical restraints. Sections 5(1)\textsuperscript{78} and 4(1)(a)\textsuperscript{79} have identical tests and identical outcomes, in that a finding of a contravention of either of those sections does not carry a penalty for a first time offence.

9.8 This is not to say that there will not be situations within a dual distribution system that warrant an assessment under the per se provisions in the Act. However genuine collusion between the dealers for example, or resale price maintenance, to the extent

\textsuperscript{78} Section 4(1)(a) \textit{“An agreement between, or concerted practice by, firms or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if- (a) it has the effect of substantially preventing or lessening competition in a market, unless a party to the agreement, concerted practice, or decision can prove that any technological, efficiency or other pro-competitive, gain resulting from it outweighs that effect.”} (Own emphasis)

\textsuperscript{79} Section 5(1) \textit{“An agreement between parties in a vertical relationship is prohibited if it has the effect of substantially preventing or lessening competition in a market, unless a party to the agreement can prove that any technological, efficiency or other pro-competitive, gain resulting from that agreement outweighs that effect.”} (Own emphasis)
that it is present in the system, should not be assessed any differently because of the presence of a dual distribution system and this should not be used as an excuse for such conduct. What is imperative is that truly collusive or outright prohibited conduct occurring within a market where dual distribution systems are employed must be carefully distinguished from restraints occurring in a dual distributor relationship that do not necessarily have a negative impact on competition.

10. Conclusion

10.1 It is submitted forward that the vital element in assessing restraints within a dual distribution system is not whether the relationship is one between competitors or parties in supply relationship but rather that a rule of reason approach and a balanced case by case analysis should be adopted to ensure that a manufacturer’s freedom to determine the methods through which it distributes its products is not hindered by fear that the use of a dual distribution system (with all their possible pro-competitive consequences) will place them in a dangerous position from a competition law perspective.

10.2 Incardona states, in favour of an economic and effects-based approach to the assessment of vertical restraints in particular that

“"The aim of any economic system is to optimize the economic welfare of all persons within the system leading to improvements in the standard of living. A secondary aim is to foster a distribution of economic benefits that allows all citizens to achieve a lifestyle consistent with the norms of the society. Laws and regulations can advance these aims or impede them, depending on how they are structured, implemented, and enforced." " history has shown free competition, subject to social (and legal) constraints fostering fairness and market integrity, to be the best means to improve economic welfare across varying categories of consumers, various kinds of economic entities, various ethnic categories, and nationalities.""80

10.3 It is submitted that her statement sums up neatly the importance of adopting an appropriate assessment mechanism to ensure that through the process of implementing the law in order foster better competition that unduly harsh tests applied are not inadvertently hindering competition and economic development.