

# FIVE MINUTES ON...

## THE CURRENT EU RULES ON DISTRIBUTION

The globalised economy makes effective distribution ever more challenging. While contracts are generally governed by local law, the key antitrust parameters are harmonised throughout the EU; they apply equally in Portugal and Poland as in France or Finland. Following recent decisions to limit restrictions on online sales, this briefing provides an overview on the current position in the EU.

The European Commission's vertical agreements block exemption regulation ("VABER") sets out the legal principles that govern distribution agreements. VABER provides a "safe harbour" for agreements between companies with market shares below 30% and which do not contain a so-called "hardcore" restriction. If an agreement falls within the safe harbour, there is a presumption that it is not caught by Article 101 of the Treaty on the Functioning of the European Union, which is the key EU law prohibiting anticompetitive agreements.

A short note cannot address each and every aspect of this set of rules and we have focused on the issues that we see most often in practice. Specific rules apply to specialized agreements such as technology licensing or motor vehicle distribution. Note also that the rules described below only apply to genuine distribution agreements: agency agreements fall outside the scope of Article 101.



### Territorial restrictions

Arguably the most distinguishing feature relative to other jurisdictions is the way EU law addresses territorial restrictions. With the objective of creating a single market, the Commission takes a particularly strict view on barriers such as export bans. These rules are not only relevant in contractual disputes but have also led to fines where companies used territorial restrictions to limit parallel trade from low-price to high-price countries.

A ban on passive sales is a "hardcore" restriction that causes an agreement to fall outside the VABER safe harbor.

- No restriction permitted on passive sales (i.e., sales not solicited by the distributor)
- Restriction on active sales only permitted in relation to exclusively allocated territories or customer groups
- No restriction on customers of direct distributor

*Example: Principal has 1 exclusive distributor for France and 3 non-exclusive distributors for Germany. A clause that restricts any of the distributors from accepting orders when approached by a customer from another EU country is invalid. Principal may restrict the German distributors from approaching customers in France, which has been exclusively allocated to a single distributor, but it may not restrict the French distributor from actively selling in Germany.*

### Selective distribution

A selective distribution system allows the principal to limit sales only to distributors that meet certain qualitative or quantitative criteria. Selective distribution systems are often used by suppliers of branded goods to protect and control the reputation of their brand.

- Selective criteria must be objectively justified
- Distributors can be prohibited from selling to non-authorized dealers i.e., those not meeting the principal's criteria

*Example: Principal restricts its distributors to sell only to dealers that have a minimum shop-size and have specially trained sales personnel.*

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### Non-compete clauses

A clause that requires the buyer to source from the supplier more than 80% of its total purchases of the contract good or services is considered a non-compete clause.

Unlike territorial restrictions, non-compete clauses are not considered hardcore restrictions, which in practice means that they can be severed from an agreement without the agreement being void.

- Permitted for a term of 5 years (renewable)
- No tacit renewal
- Post contractual non-compete clauses only permitted in limited circumstances

*Example: A clause providing for a second five year non-compete period if the parties do not terminate within six months prior to the expiry of the initial five-year period is invalid.*

### Resale price maintenance

As in most jurisdictions, EU law imposes strict limitations on the principal's ability to impose a retail price on the distributor. The restrictions apply to explicit contract clauses as well as indirect resale price maintenance, such as using threats and penalties or delaying or suspending deliveries to punish a distributor.

- Minimum or fixed resale prices not permitted
- Maximum resale prices may be imposed
- Recommended sales prices are permitted provided that they do not amount to a fixed or minimum price as a result of incentives offered by, or pressure from, the principal

*Example: A clause that makes the grant of rebates or reimbursement of promotional costs by the supplier subject to the observance of a given price level is invalid.*

### Online sales

The European Commission seeks to prevent discrimination against online sales. The general principle is that, once authorised, distributors must be free to sell on websites in the same way as in shops and physical points of sale. Internet sales are usually considered passive sales.

Some national authorities and courts have taken a very restrictive view. In Germany, Adidas recently had to abandon its restriction against sales on eBay within its selective distribution system for lack of objective justification.

- No territorial restriction (passive sales) permitted
- If objectively justified, the principal can:
  - restrict sales via third party sites such as eBay or Amazon Market Place (but see Adidas case)
  - require distributor to also have a bricks-and-mortar store

*Example: A clause which prevents a distributor from selling on eBay to preserve a brand image may not be objectively justified when the principal sells products in bricks-and-mortar discounters.*

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