

## The New Rules for Distribution Agreements

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The expiration of the validity term of the block exemption rules for some categories of vertical agreements has made it necessary for the European Commission to adopt a new Regulation<sup>1</sup> published on 20 April 2010. The new rules enter into force on 1 June 2011 and envisage a one-year grace period for agreements concluded prior to 1 June 2011, to which the old rules will be applied.

The Regulation defines a category of vertical agreements which the Commission regarded as normally satisfying the conditions laid down in Article 101(3) of the Treaty (ex Article 81 TEC). They include vertical agreements for the purchase or sale of goods or services where those agreements are concluded between non-competing undertakings, between certain competitors, or by certain associations of retailers of goods. They also include vertical agreements containing ancillary provisions on the assignment or use of intellectual property rights.

On the one hand, the rules laid down in the previous Regulation have been largely reproduced in the new one. On the other hand, the concerns of the Commission for the purchasing power in some industries have led to the adoption of a combined criterion for the application of the Regulation, requiring the assessment of the market shares of both the supplier and the distributor. The Commission believes that this restricted approach is necessary to get control over the influence that some big buyers could exert on a given market, the effect of the measure being subject to evaluation in the course of the application of the new rules.

In the context of the growing share of e-commerce over the last decade, the Commission has focused particularly on online sales in the Guidelines on Vertical Restraints<sup>2</sup>, accompanying the new Regulation. Defining them as passive sales, the Guidelines allow the suppliers to require that their distributors willing to become members of a selective distribution system for online sales have one or more brick and mortar shops or showrooms. Besides, once authorized, distributors may engage in online sales in the same way in which they perform the sales in the shops or other physical points of sale, allowing restraints on online sales, which are generally equivalent to the criteria applied to conventional sales.

As to territorial restraints, similarly to the previous Regulation, the allocation of an exclusive territory or a customer group may be done through restraint of active sales (when distributors actively approach certain customers by for instance advertising messages), whereas any restraints on passive sales (sales in which the proposition for the supply comes from the user) remain banned.

With regard to internet sales, the new rules make it clear that the cases of mandatory reference of certain “foreign” consumers to the websites of the distributors designated for their territory and the cases in which a distributor does not allow the customers in another (exclusive) territory to view his website are absolutely prohibited. Furthermore, it is banned to terminate

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<sup>1</sup> Regulation (EC) No. 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices

<sup>2</sup> Published OJ (2010/C 130/01);

an online transaction, in which the details of the credit card of a customer reveal an address outside the exclusive territory of the respective distributor.

The Commission also considers banned any practices, in which the supplier restricts the share of the total online sales, while at the same time it is allowed to place a requirement for some quantities of goods to be sold at the physical points of sale. In the same vein, the Commission considers any requirement for distributors to pay a higher price for products to be re-sold online as prohibited restraint.

The new rules call also for a fresh perspective on the review of the agreements to which they will apply, paying special attention to the requirements and possible restraints concerning e-commerce. Thus the removal of barriers to online sales will ensure the unity of the common market, while expanding the choice of consumers and promoting price competition. Whether these measures will be sufficient to achieve these objectives will be seen in the course of the application of the new rules.