



European Distribution Law Update

# EUROPEAN DISTRIBUTION LAW

NOVEMBER 2018 UPDATE





## CHAPTER 3

# CONTROL OF VERTICAL RESTRAINTS

### Section 3 Exemption of vertical restraints

#### **II. Block exemptions**

##### **3.25. "New generation" regulations**

Aware of the difficulties raised by the traditional rules, the EU authorities decided to develop more flexible rules on exemptions. Today, the regulations no longer establish lists of exempted clauses, but merely identify clauses which will prevent the exemption even if the market share thresholds are not exceeded. Black clauses deprive the agreement in its entirety of the benefit of the exemption. Red clauses cannot qualify for an exemption relative to a determined obligation but do not call into question the exemption for the overall agreement.

##### 1) Regulation No 2790/1999

On 22 December 1999, Regulation No 2790/1999 was adopted on the implementation of Article 81(3) [now Article 101(3)] of the Treaty to categories of vertical agreements<sup>1</sup>. The regulation, which laid down a presumed legality for agreements below the threshold of 30% of market share and which included no hardcore restrictions or red clauses, constituted the first culmination of the reform of the rules of competition undertaken by the Commission to improve legal certainty for businesses, to reduce the costs relating to notifications and lighten the workload of the EU authorities.

The scope of the regulation was very wide as it applied to virtually all vertical agreements, i.e. all agreements between undertakings located at different levels of the production and distribution chain having as their object the buying, selling or resale of certain goods and services. Only motor vehicle distribution agreements were excluded, as the Commission considered that the particular nature of that sector justified a special treatment. The regulation's extensive scope of application showed a concern for simplification and standardization of the rules governing the various distribution systems. The

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<sup>1</sup> OJ L 336 of 29 December 1999, 21.



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Commission wished to allow undertakings to freely choose their marketing method depending only on their strategic interests and not on the Commission's policy towards a given distribution system.

### 2) Regulation No 330/2010

Regulation No 2790/1999 was replaced by Commission Regulation (EU) No 330/2010 on the application of Article 101(3) TFEU to categories of vertical agreements and concerted practices<sup>2</sup>. The regulation and its accompanying guidelines<sup>3</sup> came into force on 1 June 2010, with a one-year transitional period. The scope of the regulation remains very wide since it covers all vertical agreements, i.e. all agreements between undertakings each of which operates at a different level of the production or distribution chain and relating to the purchase, sale or resale of certain goods and services, as well as agreements containing ancillary provisions on the assignment or use of intellectual property rights which are directly related to the use, sale or resale of goods or services. According to the EU authority, the new regulation must allow distributors to meet demand from consumers who, wherever they are in the Union, must have the possibility to buy goods or services at the most interesting price.

The regulation lays down a presumption of legality of agreements which do not contain restrictions having serious anticompetitive effects where the supplier and the buyer each hold a market share that does not exceed 30%, it being specified that the supplier's market share is calculated on the downstream market, on which he sells the contract goods or services, while the buyer's market share is calculated on the upstream market, on which he buys the contract goods or services (Article 3)<sup>4</sup>. Only agreements which are contrary to the provisions of Article 101(1) but which meet with sufficient certainty the conditions of application of Article 101(3) are included in the category (Article 2). Beyond this, the parties must assess their agreement with the Guidelines published by the Commission. The exemption is now retroactive and is valid from the conclusion of the agreement.

The Commission's position becomes more flexible towards hardcore restrictions. Although the anticompetitive nature of the agreement may be presumed where it contains such restrictions, such a presumption is now rebuttable (Guidelines, point 47). Exemption will be granted if it is established that including a black clause in the agreement results in efficiency gains and that the conditions laid down in

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<sup>2</sup> OJ L102 of 23 April 2010, 1.

<sup>3</sup> Guidelines on vertical restraints No 2010/C 130/01, OJEU C 130 of 19 May 2010, 1.

<sup>4</sup> The Guidelines on Vertical Restraints specify the rules of calculation of the market share. In-house production, that is, production of an intermediate product for own use, may be very important in a competition analysis as one of the competitive constraints or to accentuate the market position of an undertaking, but is not taken into account for the calculation of market share for intermediate goods and services. Where a producer of final goods also acts as a distributor on the market, the market definition and market share calculation need to include sales of their own goods made by the producers through their vertically integrated distributors and agents: pt 94 and 95.



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Article 101(3) TFEU are fulfilled. The prohibition of resale price maintenance is no longer absolute. According to the guidelines, resale price maintenance may not result in restricting competition and may lead to efficiencies (points 223 and 225 et seq.).

Although restrictions on the sales made over the internet remain prohibited, the Commission recognizes to selective distribution network suppliers the right to impose quality standards for the use of the internet site just as for a shop or for advertising. The supplier may thus require the distributor to have one or more traditional shops or showrooms before selling over the internet<sup>5</sup>.

Lastly, upfront access payments paid by suppliers which allow them to get access to the network and remunerate services provided by the distributor for a certain period are exempted below the 30% threshold. Above, they are likely to result in anticompetitive foreclosure since they induce the supplier to channel its products through only one distributor and constitute a barrier to entry for other suppliers (point 203 et seq.). The same applies for category management agreements (point 209 et seq.).

The Commission gave up the idea of purely and simply substituting the new general regulation for the motor vehicle regulation No 1400/2002, which expired on 31 May 2010 and proposed, for that industry, to apply different legal systems for distribution (extension of the motor vehicle regulation for three years then application of the general regulation) and the aftermarket. In the new motor vehicle regulation No 461/2010 of 27 May 2010, the Commission has adopted an original solution which consists in submitting, for the main part, aftermarket to the conditions of the general regulation No 330/2010 and to provisions specific to the motor vehicle industry<sup>6</sup>. In other words, agreements relating to the aftermarket must, in order to benefit from a block exemption, fulfill the conditions described in Regulation (EU) No 330/2010 and not contain any of the hardcore restrictions listed in Article 5 of Regulation (EU) No 461/2010. According to the Commission, the existence of a separate market for the motor vehicle aftermarket, on which effective competition depends on the degree of interaction between authorized repairers which are dependent on a network and authorized independent operators, implies the provision of specific conditions of exemption, in particular to ensure the security of end-users and to guarantee repairers' access to essential inputs, such as spare parts and technical information (point 13). These specific features make it necessary to provide for "stricter requirements concerning

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<sup>5</sup> That possibility offered to the network head to require the opening of one or more showrooms is only included in the English version of the new Guidelines No 2010/C 130/01 of 19 May 2010, at pt 54 "Under the block exemption the supplier may for instance require its distributors to have one or more brick and mortar shops or showrooms as a condition for becoming a member of its distribution system".

<sup>6</sup> Likewise, in addition to the guidelines on vertical restraints, guidelines are devoted to the motor vehicle industry. They provide, inter alia, for after-sale services, a reduction from 100% to 30% in the market share threshold for benefiting from the exemption of qualitative selective distribution (Commission Notice No 2010/C 138/05 of 28 May 2010, at pt 59).



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certain types of severe restrictions of competition that may limit the supply and use of spare parts in the motor vehicle aftermarket" (point 15).

Due to the expiry of the Vertical Restraints Regulation in 2022, the Commission has initiated an evaluation procedure (Evaluation Roadmap of 8 November 2018) in order to determine whether it should allow the regulation to lapse, prolong its duration or revise it to take into account new market developments such as the increased importance of online sales and the emergence of new market players e.g. online platforms, brought to light in its May 2017 e-commerce inquiry report and by the case-law of the Court of Justice.



## CHAPTER 6

### SELECTIVE DISTRIBUTION

#### Section 1 Restrictive agreements

##### I. Prohibition

##### 6.05. Internet sales.

Although internet sales may appear difficult to reconcile with selective distribution which requires qualified staff and an adapted environment, this is not the view of the EU authorities. According to the Guidelines on Vertical Restraints, "In principle, every distributor must be allowed to use the internet to sell products". The internet is regarded as "a powerful tool to reach a greater number and variety of customers than by more traditional sales methods, which explains why certain restrictions on the use of the internet are dealt with as (re)sales restrictions."<sup>7</sup>

Below the dual 30% market share threshold, the supplier can require the existence of one or more brick and mortar shops or showrooms<sup>8</sup> as well as a website. On the other hand, a total prohibition on online sales i.e. when the distributor has a brick and mortar outlet is not, a priori, admissible<sup>9</sup>. In effect, the guidelines qualify the use of the internet as passive selling<sup>10</sup>, so that a restriction of online selling constitutes one of the list of hardcore restrictions. Offering different language options on the website does not change the passive character of such selling<sup>11</sup>. In the Pierre Fabre ruling<sup>12</sup>, the Court of Justice therefore firmly condemned the clause of a selective distribution contract which imposes the sale of cosmetics and personal care products exclusively in a physical space, in which a qualified pharmacist

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<sup>7</sup> Guidelines on Vertical Restraints, at pt 52.

<sup>8</sup> The possibility for the network head to require the opening of a showroom (only provided in the English language version of the new Guidelines No 2010/C 130/01 of 19 May 2010, at pt 54 "Under the block exemption the supplier may for instance require its distributors to have one or more brick and mortar shops or showrooms as a condition for becoming a member of its distribution system") is of no interest as the network head will oblige new entrants selling online to be subject to at least the same requirement levels as brick and mortar dealers, who for their part have a point of sale that generates greater costs than a mere showroom.

<sup>9</sup> See Case C-322/01 *Deutscher Apothekerverband v 0800 DocMorris NV* [2003] ECR I-14887, LawLex09268, according to which the legislation which prohibits the online sale of medicinal products not requiring a prescription constitutes an unjustified restriction within the meaning of Article 34 TFEU (free movement of goods).

<sup>10</sup> Guidelines on Vertical Restraints, at pt 52.

<sup>11</sup> Guidelines on Vertical Restraints, at pt 52.

<sup>12</sup> See Case C-439/09 *Pierre Fabre Dermo-Cosmétique*, [2011] ECR I-9419, LawLex1228.



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must be present, therefore excluding internet. This clause is a restriction by object where it is not objectively justified by the properties of the products in question.

Thus a selective distribution network developer may not impose obligations which dissuade appointed dealers from using the internet by imposing criteria for online sales which are not overall equivalent to the criteria imposed for the sales from the brick and mortar shop. The difference between the criteria must be justified by the different nature of these two distribution modes<sup>13</sup>. However, even though the criteria imposed for online sales do not have to be identical to those imposed for offline sales, they should pursue the same objectives and achieve comparable results.

An agreement by which the distributor must limit its proportion of overall sales made over the internet is also regarded as a restriction on passive selling in the guidelines. The supplier may, however, oblige the distributor to sell a certain absolute amount (in value or volume) of the products offline, to ensure an efficient operation of its physical point of sale, in order to ensure that the online activity of the distributor remains consistent with the supplier's distribution model<sup>14</sup>.

A dual pricing system - i.e. requiring a higher price for products intended to be resold by the distributor online - also constitutes a hardcore restriction<sup>15</sup>. However, an individual exemption may be granted where the price difference when selling online leads to "substantially" higher costs for the manufacturer<sup>16</sup>.

This position does appear to be rather strict insofar as the difference in remuneration between sales in brick and mortar stores and online sales can be explained due to the specific services offered in-store and the various costs related to those services, such as the actual physical demonstration of products to consumers in city center stores, the booking of display areas or the hiring of dedicated personnel to promote the brand products. The national competition authorities take different approaches: the

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<sup>13</sup> Guidelines on Vertical Restraints, at pt 56: "For example, in order to prevent sales to unauthorized dealers, a supplier can restrict its selected dealers from selling more than a given quantity of contract products to an individual end user. Such a requirement may have to be stricter for online sales if it is easier for an unauthorized dealer to obtain those products by using the internet. Similarly, it may have to be stricter for offline sales if it is easier to obtain them from a brick and mortar shop. In order to ensure timely delivery of contract products, a supplier may impose that the products be delivered instantly in the case of offline sales. Whereas an identical requirement cannot be imposed for online sales, the supplier may specify certain practicable delivery times for such sales. Specific requirements may have to be formulated for an online after-sales help desk, so as to cover the costs of customers returning the product and for applying secure payment systems."

<sup>14</sup> Guidelines on Vertical Restraints, at pt 52(c).

<sup>15</sup> Guidelines on Vertical Restraints, at pt 64.

<sup>16</sup> Guidelines on Vertical Restraints, at pt 64, 2nd paragraph: "However, in some specific circumstances, such an agreement may fulfil the conditions of Article 101(3). Such circumstances may be present where a manufacturer agrees such dual pricing with its distributors, because selling online leads to substantially higher costs for the manufacturer than offline sales. For example, where offline sales include home installation by the distributor but online sales do not, the latter may lead to more customer complaints and warranty claims for the manufacturer. In that context, the Commission will also consider to what extent the restriction is likely to limit internet sales and hinder the distributor to reach more and different customers".



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German authority's approach is similar to that of the Commission<sup>17</sup> whereas the Dutch authority only sanctions dual pricing where there is a dominant position.

On the other hand, like the Commission<sup>18</sup>, the Court of Justice holds that the prohibition imposed on the members of a selective distribution system from using third-party platforms or marketplaces for the internet sale of contract goods neither infringes Article 101(1) TFEU nor does it constitute a restriction of passive sales within the meaning of Article 4 of Regulation No 330/2010<sup>19</sup>. This solution does however seem at present to be limited to selective distribution systems for luxury goods which are designed primarily to preserve the luxury image of those goods, even if the Commission, in its interpretation of the ruling, has argued that there was probably no cause to distinguish between luxury goods and body hygiene goods<sup>20</sup>. In addition, the choice of resellers must be on the basis of objective criteria of a qualitative nature, laid down uniformly and not applied in a discriminatory fashion. The criteria adopted must not go beyond what is necessary. Where those conditions are complied with, the Court finds that the prohibition of sales on third-party platforms is an appropriate means to guarantee that the contract goods are exclusively associated with the authorized distributors in the minds of consumers. It also allows the network head to ensure that its products will be sold in an online environment that corresponds to the qualitative conditions it has laid down, which would not be possible without a contractual relationship with the platforms allowing it to impose compliance with them. In addition, the prohibition does not exceed what is necessary to achieve the aim of preserving a luxury image where the supplier does not prohibit, in an absolute manner, all online sales of the contract products but only the use of third-party platforms that operate in a discernible manner in respect of consumers. Lastly, even if it restricts a specific kind of internet sale, such a prohibition does not amount to a restriction of the customers of distributors, within the meaning of Article 4(b) of Regulation No 330/2010, or a restriction of authorized distributors' passive sales to end users, within the meaning of Article 4(c) of that regulation, insofar as the supplier does not prohibit the use of the internet as a means of marketing the contract goods and customers are usually able to find the online offer of authorized distributors by using search engines.

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<sup>17</sup> See Gardena case, Germany drops proceeding after Gardena commitments, GCR, 29/11/2013; Bundeskartellamt press release of 28 November 2013.

<sup>18</sup> European Commission Final Report on the E-commerce Sector Inquiry, 10 May 2017, COM(2017) 229 final.

<sup>19</sup> Case C-230/16 Coty Germany GmbH, Judgment of 6 December 2017, LawLex18317.

<sup>20</sup> Competition Policy Brief 2018-01, April 2018, EU competition rules and marketplace bans: Where do we stand after the Coty judgment?



## II. Exoneration

### 6.07. Rule of reason.

With the entry into force of Regulation No 2790/1999 of 22 December 1999, which was replaced on 1 June 2010 by Regulation No 330/2010 of 20 April 2010, the issue of the future of the rule of reason was thrown up. As the block exemption applies to all vertical agreements, does the rule simply disappear or does it still have some influence alongside exemption of such broad scope? Although logically the rule should apply to all agreements irrespective of the share of the market controlled by the undertaking involved before looking at the question of exemption, it is likely that it will only come into play in future where the agreement does not benefit from the presumption of lawfulness set out in the Vertical Restraints Regulation.

The Court of Justice in the Metro judgment<sup>21</sup> laid down for the first time the conditions of lawfulness under Article 101(1) TFEU for selective distribution. It confirmed in that case that this type of distribution is not affected by the prohibition and does not even need to be exempted "provided that resellers are chosen on the basis of objective criteria of a qualitative nature relating to the technical qualifications of the reseller and his staff and the suitability of his trading premises and that such conditions are laid down uniformly for all potential resellers and are not applied in a discriminatory fashion". The rule of reason only applies in the case of the qualitative selection of resellers<sup>22</sup>. According to the EU courts<sup>23</sup>, a criterion of approval which depends directly or indirectly of the number of authorized resellers on the contrary is caught by Article 101(1) but may benefit from an exemption. In effect, quantitative selective distribution more directly limits the potential number of approved dealers by imposing, for example, a minimum level of sales<sup>24</sup>, limiting the number of resellers according to the number of inhabitants<sup>25</sup> or by requiring a professional qualification<sup>26</sup>.

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<sup>21</sup> Case 26/76 Metro SB-Grossmarkete GmbH & Co v Commission [1977] ECR 1875, LawLex042802; Case 31/80 L'Oréal v De Nieuwe AMCK [1980] ECR 3775, LawLex042967.

<sup>22</sup> Qualitative selection is inherent in the system. See Commission Decision No 85/616 of 16 December 1985, Villeroy & Boch, LawLex042436; Commission Decision No 92/33 of 16 December 1991, Yves Saint Laurent Parfums, LawLex055352; Commission Decision No 92/428 of 24 July 1992, Givenchy, LawLex054686.

<sup>23</sup> Case 31/80 L'Oréal v De Nieuwe AMCK [1980] ECR 3775, LawLex042967; Case 86/82 Hasselblad v Commission [1984] ECR 883, LawLex055391: a product's brand image can in itself constitute a factor of differentiation of the relevant markets; Commission Decision No 92/33 of 16 December 1991, Yves Saint Laurent Parfums, LawLex055352; Commission Decision No 92/428 du 24 July 1992, Givenchy, LawLex054686, the specific nature of luxury cosmetic products justifies the use of selection criteria relative to the presence of specialized sales personnel, the commercial environment and window displays; Case T-19/92 Groupement d'achat des centres distributeurs Édouard Leclerc v Commission [1996] ECR II-1851, LawLex053930; Case T-88/92 Leclerc v Commission [1996] ECR II-1961, LawLex053933.

<sup>24</sup> Commission Decision No 76/159 of 15 December 1975, SABA, LawLex042389.

<sup>25</sup> Commission Decision No 76/159 of 15 December 1975, SABA, LawLex042389.

<sup>26</sup> Case 243/83 Binon v AMP [1985] ECR 2015, LawLex054001.



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The General Court in subsequent decisions stated that the restrictive nature of the selection criteria must not go beyond what is necessary, that competition must be improved and that the interest of consumers must be taken into consideration<sup>27</sup>. In effect, selection criteria are objective only insofar as they are not disproportionate with regard to what consumers need in terms of assistance and **service**<sup>28</sup>. The proportionality requirement means that the criteria should be derived directly from the nature of the product and will vary accordingly<sup>29</sup>. As well as high quality<sup>30</sup> or technically advanced products<sup>31</sup>, all products with distinctive features - such as perfumes and luxury cosmetic products<sup>32</sup>, consumer durables<sup>33</sup> or computer products<sup>34</sup> - justify recourse to a specific mode of distribution. **More recently, the application of the rule of reason has been extended to selective repair systems for prestige watches, the implementation of which is justified by the complexity of the mechanisms of such watches**<sup>35</sup>.

The selection criteria must be applied in a non-discriminatory manner. Selection is only lawful if the criteria are fixed in the same way with respect to all potential resellers and are applied indiscriminately<sup>36</sup>. Thus distribution cannot be only through wholesalers to the exclusion of retailers and supermarkets where the contract product does not have any specific properties justifying such a restriction<sup>37</sup>. It is also not possible to require that the activity subject to selective distribution account for at least 60% of a

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<sup>27</sup> Case T-19/92 *Groupeement d'achat des centres distributeurs Édouard Leclerc v Commission* [1996] ECR II-1851, LawLex053930; Case T-88/92 *Leclerc v Commission* [1996] ECR II-1961, LawLex053933, for luxury goods. The specific nature of the product in question must necessitate this particular distribution system: See Commission Notice 2010/C 130/01 of 19 May 2010, at pt 175 et seq. which reasserts the principle.

<sup>28</sup> See Case T-712/14 *Confédération européenne des associations d'horlogers-réparateurs v LVMH Moët Hennessy-Louis Vuitton SA, Rolex SA, The Swatch Group SA.*, Judgment of 23 October 2017, LawLex171708, restating that although preserving a brand image cannot justify a restriction of competition by the establishment of a selective repair system, the objective of preserving the quality of products and ensuring their proper use may, in itself, justify such a restriction.

<sup>29</sup> Commission Decision No 94/29 of 21 December 1993, Grundig's EC distribution system, LawLex023894.

<sup>30</sup> Commission Decision No 94/29 of 21 December 1993, Grundig's EC distribution system, LawLex023894.

<sup>31</sup> The high level of technical advancement of consumer electronic equipment also confers on them a specific nature which justifies the obligation imposed on distributors to have a specialist department - Commission Decision No 83/672 of 21 Dec. 1983, SABA's EEC distribution system, LawLex054100. The specific and highly technically advanced nature of clocks and watches justifies the restricting of their distribution to specialized stores with trained personnel available to sell the goods from premises suitable for their display, stocking and demonstration: Commission Decision No 77/100 of 21 December 1976, Junghans, LawLex043544. See also Commission Decision No 83/610 of 5 December 1983, Murat, LawLex042426, regarding the specific nature of jewellery.

<sup>32</sup> Commission Decision No 92/33 of 16 December 1991, Yves Saint Laurent Parfums, LawLex055352; Commission Decision No 92/428 of 24 July 1992, Givenchy, LawLex023937; Case T-19/92 *Groupeement d'achat des centres distributeurs Édouard Leclerc v Commission* [1996] ECR II-1851, LawLex053930; Case T-88/92 *Leclerc v Commission* [1996] ECR II-1961, LawLex053933.

<sup>33</sup> Relative to high quality porcelain tableware, see, Commission Decision No 85/616 of 16 December 1985, Villeroy & Boch, LawLex042436: the nature of the product justifies the obligation placed on distributors to sell these durable consumer goods in a shop easily accessible to the public, specializing in such goods or having a specialist department and technically trained staff, and to provide an after-sales service and provide advice to customers wishing to supplement a service.

<sup>34</sup> Commission Decision No 83/672 of 21 December 1983, SABA's EEC distribution system, LawLex054100; Commission Decision No 84/233 of 18 April 1984, IBM Personal Computer, LawLex055320.

<sup>35</sup> Case T-712/14 *Confédération européenne des associations d'horlogers-réparateurs*, Judgment of 23 October 2017, LawLex171708.

<sup>36</sup> Case 126/80 *Salonia v Poidomani e Giglio* [1981] ECR p.1563, LawLex042966; Case 243/83, *Binon v AMP* [1985] ECR 2015, LawLex054001; Case T-19/92 *Groupeement d'achat des centres distributeurs Édouard Leclerc v Commission* [1996] ECR II-1851, LawLex053930.

<sup>37</sup> Commission Decision No 85/44 of 10 December 1984, Grohe's distribution system, LawLex055321.



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shop's activities<sup>38</sup>. The number of refusals of approval to resellers who satisfy the qualitative criteria for entry to a network is sufficient proof of discrimination<sup>39</sup>.

Lastly, where the selection of authorized repairers is indeed carried out on the basis of objective criteria laid down uniformly for all potential resellers and not applied in a discriminatory fashion, it is not necessary to verify, in addition, whether the establishment of the network will have the effect of eliminating all competition<sup>40</sup>.

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<sup>38</sup> Case T-19/92 Groupement d'achat des centres distributeurs Édouard Leclerc v Commission [1996] ECR II-1851, LawLex053930.

<sup>39</sup> Case 107/82 AEG v Commission [1983] ECR 3151, LawLex054025.

<sup>40</sup> Case T-712/14 Confédération européenne des associations d'horlogers-réparateurs, Judgment of 23 October 2017, LawLex171708.



## CHAPTER 7

# MOTOR VEHICLE DISTRIBUTION AGREEMENTS

### Section 2 Block exemption

#### **II. After-sales : Regulation No 461/2010**

##### **7.12. General conditions for exemption.**

Pursuant to Article 4 of Regulation No 461/2010, Article 101 TFEU does not apply to agreements relating to the sale or resale of spare parts or the provision of repair and maintenance services, which fulfill the requirements for an exemption under Regulation No 330/2010 and do not contain any of the hardcore restrictions listed in Article 5. Agreements, either directly or indirectly, in isolation or in combination, must not restrict the sales of spare parts by members of a selective distribution system to independent repairers which use those parts for the repair and maintenance of a motor vehicle<sup>41</sup>, restrict the supplier's ability to sell spare parts, repair tools or diagnostic or other equipment to authorized or independent operators (distributors or repairers) or end users<sup>42</sup>, or to place its trade mark or logo effectively and in an easily visible manner on the components supplied or on the spare parts (Article 5)<sup>43</sup>. The aim of those provisions is to ensure effective competition on the repair and maintenance markets and to allow repairers to offer end users competing spare parts. They do not exclude the ability for vehicle manufacturers to require the authorized repairers within their network to only use spare parts that match the quality of the components used for the assembly of a certain motor vehicle. According to the guidelines, matching quality parts must be of a sufficiently high quality that their use does not endanger the reputation of the authorized network in question (point 20). Likewise, for repairs made under warranty of the manufacturer, the exemption applies to agreements which require repairers to use only spare parts supplied by the vehicle manufacturer (point 17). Regulation No 461/2010 has been applicable

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<sup>41</sup> According to pt 22 of the 2010/C 138/05 Guidelines, this restriction concerns a particular category of parts, referred to as captive parts, which may only be obtained from the motor vehicle manufacturer or from members of its authorized networks.

<sup>42</sup> This provision covers in particular so-called 'tooling arrangement' between component suppliers and motor vehicle manufacturers, which are sub-contracting agreements in principle excluded from the scope of Article 101 TFEU, unless the component supplier must transfer its ownership of such a tool, intellectual property rights, or know-how, bears only an insignificant part of the product development costs, or does not contribute any necessary tools, intellectual property rights, or know-how. Guidelines, at pt 23.

<sup>43</sup> This provision should facilitate the identification of compatible replacement parts which can be obtained from original equipment suppliers (OESs). Guidelines, at pt 24.



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since 1 June 2010 to such agreements. **As the Commission has specified, it does not affect the possibility for the manufacturers to limit warranties to vehicles sold by authorized dealers<sup>44</sup>.**

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<sup>44</sup> European Commission, letter of 4 December 2017 to the Fédération nationale de l'artisanat automobile.



## CHAPTER 9

# COMMERCIAL AGENTS

### Section 2 EU harmonization

#### **9.02. Directive No 86/653 of 18 December 1986.**

Combining the laws of the Member States seemed necessary insofar as the differences between the systems appreciably affected the conditions of competition and the exercise of the profession, and undermined the certainty in commercial transactions. In the case of commercial agents, the divergences affected the agents' level of protection in their relations with the principals and constituted a restriction to the conclusion and application of commercial representation agreements between a principal and a commercial agent established in different Member States.

Directive No 86/653 of 18 December 1986 harmonized the laws of the Member States on the relations between self-employed commercial agents and principals<sup>45</sup>. Article 1(2) of the directive defines the scope of the European regulation and describes the agent as, "a self-employed intermediary who has continuing authority to negotiate the sale or the purchase of goods on behalf of another person, hereinafter called the 'principal', or to negotiate and conclude such transactions on behalf of and in the name of that principal"<sup>46</sup>. Commission agents, who operate on behalf of the principal but in their own name<sup>47</sup>, commercial agents whose activities are unpaid or who operate on commodity exchanges or in the commodity market, or those persons whose activities as commercial agents are considered secondary (Article 2) are not caught by the directive. Article 1 requires continuing authority. The condition is met even though the agent has concluded a single contract where it has been conferred authority by the

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<sup>45</sup> Council Directive 86/653 of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents, OJ L 382 of 31.12.1986, 17.

<sup>46</sup> Even though it refers to agreements relating to goods, the directive may apply to an agency agreement having as its object the provision of services: Case C-3/04 Poseidon Chartering [2006] ECR I-2505, LawLex091442.

<sup>47</sup> Case C-85/03 Mavrona [2004] ECR I-1573, LawLex091194: in any event, the Court underlined that the need for protection of those two operators is different.



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principal to negotiate successive extensions to that contract<sup>48</sup>. Lastly, the directive is only applicable if the activities of the agent are carried out on the territory of a Member State<sup>49</sup>.

No condition of validity is expressly imposed by Directive No 86/653, which merely provides that each party is entitled to receive, on request from the other, a signed written document setting out the terms of the agency agreement and its subsequent amendments<sup>50</sup>. However, by providing that the Member States may establish that a written document is a condition of validity of the agreement, the directive implies that the minimum requirement is the possibility for the parties to impose a written document, without it being a condition of the validity of the agreement. Moreover, since the directive does not indicate that the agents must be entered in a register, it cannot be established as a condition of validity by a Member State<sup>51</sup>. However, the directive does not preclude national legislation from making registration of a commercial agent in the register of undertakings subject to that agent's enrolment in a register provided for that purpose, on condition that non-registration in the register of undertakings does not affect the validity of the agency agreement or does not adversely affect the protection which the directive confers on commercial agents in their relations with their principals<sup>52</sup>.

In the absence of provision on this matter in the agreement, a commercial agent is entitled to the remuneration that commercial agents are customarily allowed in the place where he/she carries on the activity and, if there is no such customary practice, to reasonable remuneration taking into account all the aspects of the transaction (Article 6). If the remuneration includes parts which vary with the number or value of business transactions, it is subject to Articles 7 to 12 on the right to commission. Commission is owed for all transactions concluded as a result of the agent's action during the period covered by the agency agreement, "where the transaction has been concluded with a third party whom he has previously acquired as a customer for transactions of the same kind", "where he is entrusted with a specific geographic area or group of customers" or "where he has an exclusive right to a specific geographical area or group of customers, and where the transaction has been entered into with a customer belonging to that area or group". Where agents are responsible for a specific geographic area, they are not only entitled to remuneration for transactions concluded as a result of their intervention and with customers

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<sup>48</sup> Case C-3/04 Poseidon Chartering [2006] ECR I-2505, LawLex091442.

<sup>49</sup> Case C-507/15 Agro Foreign Trade & Agency Ltd, Judgment of 16 February 2017, LawLex17367: a commercial agent who carries out his activities in Turkey does not fall within the scope of application of Directive No 86/653 even if the principal is established in a Member State.

<sup>50</sup> Directive No 86/653, Article 13.

<sup>51</sup> Case C-215/97 Bellone v Yokohama [1998] ECR I-2191, LawLex091235; Case C-456/98 Centrosteeel [2000] ECR I-6007, LawLex09903.

<sup>52</sup> Case C-485/01 Caprini [2003] ECR I-2371, LawLex09975.



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which they have found themselves, but also those concluded without having found the customers<sup>53</sup>. The concept of "customer belonging to that area" depends on the place where the agent's commercial activities are effectively carried out. In the case of a customer having many establishments, the place where negotiations with the customer took place or should, in the normal course of events, have taken place, the place where the goods were delivered and the place where the establishment which placed the order is located will be taken into account<sup>54</sup>. On the other hand, the commercial agent entrusted with a specific geographical area does not have the right to a commission for transactions concluded by customers belonging to that area with a third party without any action, direct or indirect, on the part of the principal as required by Article 10<sup>55</sup>. **Further, under Article 11, the agent may lose his/her right to commission both in the case of non-performance and partial non-performance of the contract concluded between the principal and the third party<sup>56</sup>. In the case of partial non-performance of the contract concluded between the principal and the third party, the agent may thus be required to refund a part of his commission if the non-performance is not due to a reason for which the principal is responsible<sup>57</sup>.**

The end of the agency agreement gives rise to compensation for termination to the benefit of the commercial agent. The directive offers a choice to Member States between indemnity and compensation for damage (Article 17). The parties cannot depart from the provisions relating to compensation to the detriment of the commercial agent before the expiry of the agreement. As a rule of public policy, the principle of compensation cannot be bypassed by an *electio juris* provision designating a foreign law, even within the framework of an international agreement<sup>58</sup>. Where the Member State chooses the indemnity system, it must cover customers with whom the agent has established specific business relations even though those customers already had business relations with the principal in relation to other comparable goods but of a different brand<sup>59</sup>. The amount must be equitable having regard to added value contributed by the intermediary as part of his activity (contribution of new customers and increase in the volume of business with existing customers) and which amounts for him to a loss of customers. The amount of the indemnity may not exceed a figure equivalent to the annual remuneration

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<sup>53</sup> Case C-104/95 *Kontogeorgas v Kartopak* [1996] ECR I-6643, LawLex09326.

<sup>54</sup> Case C-104/95 *Kontogeorgas v Kartopak* [1996] ECR I-6643, LawLex09326.

<sup>55</sup> Case C-19/07 *Chevassus-Marche* [2008] ECR I-159, LawLex09767: the national courts are however invited to examine whether the third party is not himself a representative of the principal. By contrast, Case C-104/95 *Kontogeorgas v Kartopak* [1996] ECR I-6643, LawLex09326: a commercial agent, when entrusted with a geographical area, is entitled to a commission relating to transactions concluded with customers belonging to that area even if they were so without his intervention.

<sup>56</sup> Case C-48/16 *ERGO Poist'ovna a.s.*, Judgment of 17 May 2015, LawLex172030.

<sup>57</sup> Case C-48/16 *ERGO Poist'ovna a.s.*, cited above, the circumstances attributable to the principal can stem from the loss of confidence by customers due to the poor quality of the services.

<sup>58</sup> Case C-381/98 *Ingmar GB* [2000] ECR I-9305, LawLex09602: the principle of compensation of the commercial agent is necessary to protect the political, social or economic organization of the European Union, so that it must be regarded as a public policy rule.

<sup>59</sup> Case C-315/14 *Marchon Germany GmbH*, Judgment of 7 April 2016, LawLex16734.



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calculated from the agent's average annual remunerations over the preceding five years and if the contract goes back less than five years, on the average for the period in question. The method of individual calculation of the indemnity proposed by the directive may be replaced by a method of calculation attaching more importance to the criterion of equity provided that the indemnity is equal or greater<sup>60</sup>. Similarly, in the case of an international agreement, the law of a Member State which meets the requirement for transposing the directive which has been chosen by the parties to a commercial agency contract may be disregarded by the court before which the dispute has been brought, established in another Member State, in favor of the law of the forum on grounds of its mandatory nature, and the fact that the legislature of that Member State grants the commercial agent protection going beyond that provided for by the directive<sup>61</sup>. The entitlement to indemnity cannot be automatically limited by the amount of the commission lost by the agent as a result of the termination of the contractual relationship, even though the benefits which the principal continues to derive have to be given a higher monetary value<sup>62</sup>. **Lastly, contrary to the solution of the French courts, the Court of Justice has ruled that the termination of the agency contract during the trial period cannot deprive the agent of his right to indemnity provided by Article 17 of the directive<sup>63</sup>.** Furthermore, the termination indemnity does not prevent the agent from seeking damages (Article 17(2)(c)). National legislation may therefore provide that a commercial agent is entitled, on termination of the agency contract, to an indemnity for customers limited to a maximum of one year's remuneration and, if that indemnity does not cover all of the loss actually incurred, to the award of additional damages, provided that such legislation does not result in the agent being compensated twice for the loss of commission<sup>64</sup>. The directive does not make the award of damages conditional on demonstration of the existence of a fault attributable to the principal which caused the alleged harm - it is for the Member States to determine the system of liability - but does require the alleged harm to be distinct from that compensated for by the indemnity for clients<sup>65</sup>. The compensation system must cover the damage resulting from the loss by the agent of the commission that he could have expected and/or from the inability to amortize the costs and expenses incurred for

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<sup>60</sup> Case C-465/04 Honyvem Informazioni Commerciali [2006] ECR I-2879, LawLex09944.

<sup>61</sup> Case C-184/12 United Antwerp Maritime Agencies (Unamar) NV, Judgment of 17 October 2013, LawLex131533.

<sup>62</sup> Case C-348/07 Semen c. Deutsche Tamoil GmbH [2009] ECR I-2341, LawLex092342.

<sup>63</sup> Case C-645/16 Conseils et mise en relations SARL, Judgment of 19 April 2018, LawLex18760: according to the Court of Justice relations between a commercial agent and a principal subsist as from the time when a contract, the purpose of which is either to negotiate the sale or purchase of goods, or to negotiate and conclude such transactions on behalf of the principal, irrespective of whether that contract provides for a trial period. It follows that the provisions of that directive are applicable as soon as such a contract is concluded between the principal and the commercial agent, even if that contract provides for a trial period. In addition, regardless of the time when the termination takes place, the agent must be indemnified for his past services from which the principal will continue to benefit beyond the termination of the contractual relationship or for the costs and expenses he has incurred in providing those services.

<sup>64</sup> Case C-338/14 Quenon K. SPRL, Judgment of 3 December 2015, LawLex151639.

<sup>65</sup> Case C-338/14 Quenon K. SPRL, cited above.



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the performance of the agreement on the principal's advice. Regardless of the option taken, the agent loses his entitlement to indemnity if, within one year following termination of the contract, he/she has not notified the principal that he intends pursuing his entitlement (Article 17(5)). No indemnity shall be paid where default attributable to the agent justifies immediate termination of the agreement or where the agreement is terminated at the agent's initiative, unless the cause is attributable to the principal or is justified on grounds of age, infirmity or illness of the agent (Article 18). The fault committed after the termination of the contract does not deprive the agent of its indemnity<sup>66</sup>.

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<sup>66</sup> Case C-203/09 Volvo Car Germany, LawLex101253.