

ACTIVE AND PASSIVE SALES IN EXCLUSIVE DISTRIBUTION

Hot Topics and Commentary

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The Origin of the Distinction

Early case law (Grundig, Maschinenbau)

Open and closed exclusivities; absolute territorial protection prohibited

Regulation 67/67 and 1983/83

Warranting freedom of parallel imports

Art. 3 Regulation 1983/83

The exemption shall not apply where:

- (c) users can obtain the contract goods in the contract territory only from the exclusive distributor and have no alternative source of supply outside the contract territory;
- (d) one or both of the parties makes it difficult for intermediaries or users to obtain the contract goods from other dealers inside the common market

Art. 4 Regulation 330/2010 (Block Exemption Regulation)

The exemption shall not apply to vertical agreements which have as their object:

- (b) the restriction of the **territory** into which, or of the **customers** to whom, a buyer party to the agreement, without prejudice to a restriction on its place of establishment, may sell the contract goods or services, except:
 - (i) the restriction of **active sales** into the **exclusive territory** or to an exclusive customer group **reserved to the supplier or allocated** by the supplier **to another buyer**, where such a restriction does not limit sales by the customers of the buyer.

Agenda

A. Defining Active and Passive Sales

What limitations can be imposed on distributors in traditional sales transactions?

B. Active and Passive Sales in the Internet Era

Does the distinction between active and passive sales equally apply to online sales?

C. Freedom of Active Sales to Non-Exclusive Territories

How should exclusive territory be defined (*“exclusive territory [...] reserved by the supplier exclusively for himself”*)?

D. Template Provision on Active and Passive Sales

A. Defining Active and Passive Sales

Protection afforded to exclusive distributor against efforts by other distributors to **actively** sell the same products in its territory is an essential element of any exclusive distribution network

Distributors cannot be restricted in their ability to conclude passive sales

Distinction between active and passive sales critical to assessment whether restrictions in exclusive distribution agreements will or will not fall within the safe harbour provided by Block Exemption Regulation

A. Defining Active and Passive Sales

Offline active sales, according to § 51 of the *Guidelines on Vertical Restraints*:

- Actively approaching individual customers, for instance by **direct and unsolicited mail** or **sales visits**
- Actively **targeting** a specific customer group or customers in a specific territory through advertisements in media or other specifically targeted promotions
- Advertisements or promotions that are **only attractive** for the distributor **if they (also) reach a specific group of customers or customers in a specific territory**

A. Defining Active and Passive Sales

Offline passive sales, according to § 51 of the *Guidelines on Vertical Restraints*:

- **Responding to unsolicited requests** from individual customers, including the actual delivery of products or services
- **General advertising or promotion**, even if it happens to also reach customers in other distributors' exclusive territories, provided that such promotion is a reasonable way to reach customers in the distributor's own territory or other non-exclusive territories
- Advertisements or promotions that are **attractive** for the distributor, also if **they do not reach a specific group of customers or customers in a specific territory**

B. Active and Passive Sales and Online Retailing

The European Commission views online retailing as a powerful tool to promote cross-border commerce between EU member states

Restrictions that limit the distributor's access to a greater number and variety of customers may be regarded as anti-competitive and thus as hardcore restrictions of passive selling

§ 51 of the *Guidelines on Vertical Restraints*:

“In principle, every distributor must be allowed to use the internet to sell products.”

B. Active and Passive Sales and Online Retailing

Online passive sales, according to § 52 of the *Guidelines on Vertical Restraints*:

- Operating a **website** to sell products
- A **customer visiting the website** of a distributor and contacting the distributor, **leading to a sale** (including delivery)
- A customer visiting the website of a distributor and **opting to be kept (automatically) informed** by the distributor, **leading to a sale** (including delivery)

B. Active and Passive Sales and Online Retailing

As such, **hardcore restrictions of passive selling** include, according to § 52 of the *Guidelines on Vertical Restraints*:

- Requiring the distributor to **prevent customers located in another (exclusive) territory to view its website** or to **automatically re-route** customers to the supplier's or other exclusive distributors' websites
- Requiring the distributor to **terminate consumers' online transactions** once their credit card data reveal an **address outside the distributor's allocated territory**
- Requiring the distributor to **limit its proportion of overall sales made over the internet**
- Requiring that the distributor pays a **higher price for products intended to be resold by the distributor online** than for products intended to be resold offline.

B. Active and Passive Sales and Online Retailing

Online active sales, according to § 53 of the *Guidelines on Vertical Restraints*:

- Sending **unsolicited emails** to individual customers
- Operating a **website targeted at customers** primarily inside a territory exclusively allocated to another distributor
 - For instance, operating a website under the top-level domain of a country exclusively allocated to another distributor
- **Territory-based banners** on third party websites
- **Sponsored places on a search engine** displayed specifically to users in a particular territory

B. Active and Passive Sales and Online Retailing

- Does the position of the Commission in respect of online sales **reduce the protection of exclusive distributors** against 'outside' sales by other distributors?
- Does the internet really make it so much **easier to achieve passive sales**?
- The Commission's position in respect of the **language options** offered by a distributor on its website
- **Technological developments** will raise new questions about what is considered a lawful restriction of online sales

C. Active Sales to Non-Exclusive Territories

According to Article 4 of the VABER the **restriction of active sales** can be imposed upon a distributor only with respect to the **exclusive territory** or to an **exclusive customer group** reserved to the supplier or allocated by the supplier to another buyer

This means that the supplier cannot protect non-exclusive territories from possible aggressive promotion by his distributors. Is this acceptable from a commercial point of view?

The answer may be no, since the problem mainly arises within selective distribution

C. Active Sales to Non-Exclusive Territories

Meaning of “*exclusive territory*”

- Territory with more than one exclusive distributor?
- Sole distributor (supplier reserves the right to direct sales)?
- *De facto* exclusive distributor (without contract)?

C. Active Sales to Non-Exclusive Territories

Meaning of territory “*reserved to the supplier*”?

- The supplier distributes through a subsidiary?
- The supplier sells directly to end-users?
- The supplier sells to the market (including local distributors), without having an exclusive importer?
- The supplier sells through an agent appointed for the territory?

D. Template Provision on Active and Passive Sales

“Reserved Territories” means (i) the countries specified in Schedule X, comprising the countries in respect of which the Supplier has appointed an exclusive distributor and the countries which the Supplier has reserved to itself; and (ii) any other countries in respect of which the Supplier informs the Distributor by written notice that it has appointed or will appoint an exclusive distributor or has reserved to itself.

The Distributor shall refrain from making active sales of Products to customers in Reserved Territories. For the purpose of this agreement, active sales shall be understood to mean actively approaching or soliciting customers, including, but not limited to, the following actions:

- a) visits and direct mail, including the sending of unsolicited emails;

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D. Template Provision on Active and Passive Sales

- b) any advertising or promotion that is specifically addressed to or targeted at customers in Reserved Territories, or any advertising or promotion that the Distributor would not reasonably carry out but for the likelihood that it will reach customers in Reserved Territories; and
- c) any online advertisements or other efforts to be found specifically by customers in Reserved Territories, including in any event the use of territory based banners on third party websites, paying a search engine or online advertisement provider to have advertisements or higher search rankings displayed specifically to users in Reserved Territories, the use of top-level domains commonly used in any of the Reserved Territories and the translation of (part of) the Distributor's website into a language other than an official language of any country forming part of the Territory.