



International Distribution Institute

Is it really necessary to respect the 5 years' duration limitation contained in article 5(1)(a) of Regulation 330/2010?

Jeffrey A. Brimer, Faegre Baker Daniels LLP, Denver

Karsten Metzloff, Noerr LLP, Berlin

John Pratt, Hamilton Pratt, Warwick

Rocío Belda de Mergelina, Garrigues SLP, Madrid



Article 101 of the Treaty on the Functioning of the European Union (“TFUE”)

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, (...) which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

(...)

(c) share markets or sources of supply;

(...)

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of any agreements or category of agreements between undertakings (...) which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) Impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) Afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.



Article 5.1(a) of BER 330/2010

Excluded restrictions

1. **The exemption** provided for in Article 2 **shall not apply to** the following obligations contained in vertical agreements:

(a) **any direct or indirect non-compete obligation, the duration of which is indefinite or exceeds five years;**

(b) any direct or indirect obligation causing the buyer, after termination of the agreement, not to manufacture, purchase, sell or resell goods or services;

(...)

For the purposes of point (a) of the first subparagraph, a non- compete obligation which is tacitly renewable beyond a period of five years shall be deemed to have been concluded for an indefinite duration.

2. By way of derogation from paragraph 1(a), the time limitation of five years shall not apply where the contract goods or services are sold by the buyer from premises and land owned by the supplier or leased by the supplier from third parties not connected with the buyer, provided that the duration of the non-compete obligation does not exceed the period of occupancy of the premises and land by the buyer.



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LEGAL FRAMEWORK WITHIN THE EU AND IN THE US

1. What is a non-compete clause for the purposes of EU competition law?

- In-term non compete
- Purchase restriction

2. Exemptions and No Exemptions in the rule?

• Exemption:

- 5 years term
- 80% of the supply

• No Exemption:

- term exceeds 5 years
- indefinite term
- automatic renewal of the term
- Occupancy of premises



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LEGAL FRAMEWORK WITHIN THE EU AND IN THE US

3. What is the reason for this approach and how does the Commission and the ECJ regard it?

- Market foreclosure
- The common identity and reputation of the network
- High Investments
- The applicability of the *de minimis* rule

4. Legal framework in the US

- Competition (“antitrust”) laws at federal and state level
- No “national” law on non-competition agreements
- State laws govern non-competition agreements
- Reasonableness – geographic scope and duration



Article 1 of BER 330/2010

Definitions

1. For the purposes of this Regulation, the following definitions shall apply:

(...)

(d) 'non-compete obligation' means any direct or indirect obligation causing the buyer not to manufacture, purchase, sell or resell goods or services which compete with the contract goods or services, or any direct or indirect obligation on the buyer to purchase from the supplier or from another undertaking designated by the supplier more than 80 % of the buyer's total purchases of the contract goods or services and their substitutes on the relevant market, calculated on the basis of the value or, where such is standard industry practice, the volume of its purchases in the preceding calendar year



EU Guidelines on Vertical Restraints

(155) Entry barriers that may hinder suppliers from creating new distributors or finding alternative distributors are less important in assessing the possible anti-competitive effects of exclusive distribution. Foreclosure of other suppliers does not arise as long as exclusive distribution is not combined with single branding.



EU Guidelines on Vertical Restraints

(190) (...) As for the vertical restraints on the purchase, sale and resale of goods and services within a franchising arrangement, such as selective distribution, non-compete obligations or exclusive distribution, the Block Exemption Regulation applies up to the 30 % market share threshold. The guidance provided in respect of those types of restraints applies also to franchising, subject to the following two specific remarks:

- (a) The more important the transfer of know-how, the more likely it is that the restraints create efficiencies and/or are indispensable to protect the know-how and that the vertical restraints fulfil the conditions of Article 101(3);
- (b) A non-compete obligation on the goods or services purchased by the franchisee falls outside the scope of Article 101(1) where the obligation is necessary to maintain the common identity and reputation of the franchised network. In such cases, the duration of the non-compete obligation is also irrelevant under Article 101(1), as long as it does not exceed the duration of the franchise agreement itself.



**DOES THIS RULE IMPACT IN THE SAME MANNER DISTRIBUTION AND
FRANCHISE AGREEMENTS?**

**DOES THE PROVISION APPLY TO DISTRIBUTION AND FRANCHISE
AGREEMENTS TO THE SAME EXTENT?**

- Distribution Agreements
- Franchise Agreements
- How would a foreign investor assess the impact of the rule?



Contact Information

- **Rocío Belda de Mergelina**, Garrigues SLP
 - Rocio.Belda@garrigues.com
- **Jeffrey A. Brimer**, Faegre Baker Daniels LLP
 - jeff.brimer@FaegreBD.com
- **Karsten Metzloff**, Noerr LLP
 - Karsten.Metzloff@noerr.com
- **John H. Pratt**, Hamilton Pratt
 - john.pratt@hplaw.co.uk