



International Distribution Institute

Exclusive and selective distribution agreements: what's new in the 2022 VBER?

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The 2010 VBER approach

Since 1999, differently from previous model-based BERs (e.g. exclusive distribution, franchising) VBERs follow a general approach to vertical agreements, => market share thresholds, hardcore restrictions etc.

- selective distribution is covered by the VBER
- among hardcore restrictions, specific exceptions aimed at protecting exclusive and selective distribution (protection from active sales; restrictions of sales to unauthorized distributors)

The revision process

- The digital transformation leads suppliers to look for a closer control of their distribution systems.
Demand for greater flexibility to design distribution systems and protect them from developments which may have a negative impact on incentives /sustainability
- Expert report on active sales restrictions (2021):
 - the use of exclusive distribution is declining: is the approach of the VBER unduly strict?
 - is the integrity of selective distribution systems not sufficiently protected?

The 2022 VBER and VGL approach

Increasing focus on types of ‘distribution systems’:

- In Art. 4 VBER the list of hardcore territorial/customer sales restrictions is now divided into 3 parts, for exclusive, selective and free distribution (neither exclusive nor selective) systems
- exclusive distribution, selective distribution and franchising are addressed in VGL 6.2, separately from ‘vertical restraints’ (such as single branding, exclusive supply etc. in VGL 8.2).

Exclusive distribution

- significant changes in the VBER to provide more flexibility and broaden the possibility to grant protection from active sales:
 - definition of exclusive distribution
 - (i) shared exclusivity
 - (ii) passing-on of active sales restrictions
 - (iii) codified definition of ‘active sales’

Exclusive distribution

➤ **definition** of ‘exclusive distribution system’ for the purposes of the VBER [art. 1(1), lett. h)]: “a distribution system where the supplier allocates territories or groups of customers exclusively to itself or to a maximum of five buyers and restricts all its other buyers from actively selling into the exclusive territory or to the exclusive customer group”.

=> the **parallel imposition of active sales restrictions** on all buyers is part of the notion

(i) Shared exclusivity

- the supplier may ‘exclusively’ allocate a territory or a customer group to a maximum of five distributors
- ✓ all the appointed distributors enjoy protection from active sales
- ✓ active and passive sales by these distributors within the exclusive territory cannot be restricted
- more flexibility, no need to artificially split territories to obtain protection against active sales
- fixed ceiling (up to 5) to provide legal certainty on the scope of application of the VBER

(ii) Passing-on of active sales restrictions

- pursuant to the new Art. 4, suppliers may require their buyers to pass-on the active sales restriction, i.e. to prevent their direct customers from actively selling into exclusive territories or to exclusive customer groups
- ✓ strengthened protection to avoid the risk of circumvention of the active sales restrictions

(ii) Passing-on of active sales restrictions

- only direct customers – the supplier may not require its buyers to pass on the active sales restriction to customers further down the distribution chain
- ✓ reference to structured distribution networks/ long-term distribution agreements removed from the final text => applicable to any purchase? The issue is how to enforce the prohibition depending on the relationship with the customer

(iii) Definition of active sales

- now included in the VBER [art. 1(1)(I)] - codified notion legally binding for NCAs and national courts to ensure a more harmonized application
- some clarification on what amounts to active selling, for example operating a website with top-level domain or language option corresponding to particular territories different from the one in which the seller is established

Selective distribution

- the approach has been maintained whereby selective distribution agreements are **block exempted** provided they do not contain hardcore restrictions and the market shares are below 30%, regardless of the nature of the product, of the nature of the selection criteria and of whether the selection criteria are published
- ✓ not intrinsically restrictive of competition – focus on the impact on the market

Enhanced protection

- i. new Article 4 allows suppliers to prohibit buyers from selling to unauthorized distributors located in a territory where the supplier operates a selective distribution system, regardless of whether those buyers are located inside or outside that territory
 - ii. the supplier can require its buyers to impose the same prohibition on their direct and indirect customers (passing-on)
- ✓ less room for strategic conduct aimed at circumventing the selective distribution system

Combination of selective and exclusive distribution

- combination of exclusive and selective distribution in the same territory still not block exempted (§ 236 VGL), notwithstanding requests for a more flexible approach to the combination of exclusive distribution at the wholesale level and selective distribution at the retail level

Combination of selective and exclusive distribution

- ✓ the Commission has not changed its approach (cfr. Guess)
- ✓ the system (wholesalers and retailers) is considered as a whole: the approach does not allow the combination of restrictions of sales to unauthorized distributors and restrictions of active sales, even at the wholesale level

Combination of selective and exclusive distribution

- without the possibility to grant protection from active sales, how to preserve the wholesalers' incentives?
- ✓ pursuant to § 236 VGL, the supplier may still (i) commit to supply only certain authorized distributors, in certain parts of the selective distribution territory ('exclusivity' with no protection from active sales); ii) impose a location clause on authorized distributors; (iii) not make any direct sales in that territory itself