



International Distribution Institute

# **PROTECTING DISTRIBUTORS AGAINST PARALLEL SALES**

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# Introduction

Protecting a distribution network from aggressive parallel sales has always been a crucial issue. Now, under the rules of the new VBER 720/2022, we need reconsider this issue in view of the substantial changes introduced by VBER.

A “mock case” based on a typical situation, will be discussed by this panel of experts:

- **CHAIR: Fabio Bortolotti**, Buffa Bortolotti & Mathis, Turin; Chair IDI, IDI country expert for Italy
- **Tina Denso**, Brödermann Jahn Rechtsanwaltsgesellschaft mbH, Hamburg
- **Federico Rizzo**, Diadora, Caerano di San Marco (TV)
- **Olivier van Fraeyenhoven**, ASTREA Attorney-at-law, Antwerpen

# The practical approach through a mock case

In this panel we are going to discuss the issue of protecting distributors against parallel sales, in the context of the VBER 2022, which has introduced an important change regarding the prohibition of active sales by the customers of the exclusive distributor.

In order to verify in a practical way the possible options offered to companies managing a network of exclusive distributors, we will analyse a hypothetical situation within the context of a mock-case, in which the members of the panel will play the following roles.

## SunnyDay

An Italian company producing high quality sunglasses is selling its products in the EU through exclusive distributors-importers appointed for the territories of Belgium, Netherlands, France, Germany, Austria, Spain and Scandinavian countries.

In the remaining EU countries SunnyDay has not appointed exclusive distributors, but provides its products directly to companies which order the goods.

In Italy Sunny-Day distributes directly its products to retailers.

## Gloria Trading sarl

A Belgian company acting as SunnyDay's exclusive distributor for Belgium. Gloria sells SunnyDay's sunglasses to several "premium" resellers (opticians, specialised corners in department stores, etc.) in Belgium.

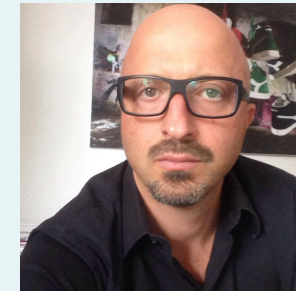
**Bluetrade Int'l:** a Belgian company supplied by Gloria, engaged in aggressive sales to other EU countries, especially Germany and France.

**MB Optical**, a German company which manages a network of specialised stores and is developing online sales to other EU countries.

**MB Optical Int'l.**, the Estonian daughter-company of MB Optical.

## Federico Rizzo

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## Olivier van Fraeyenhoven

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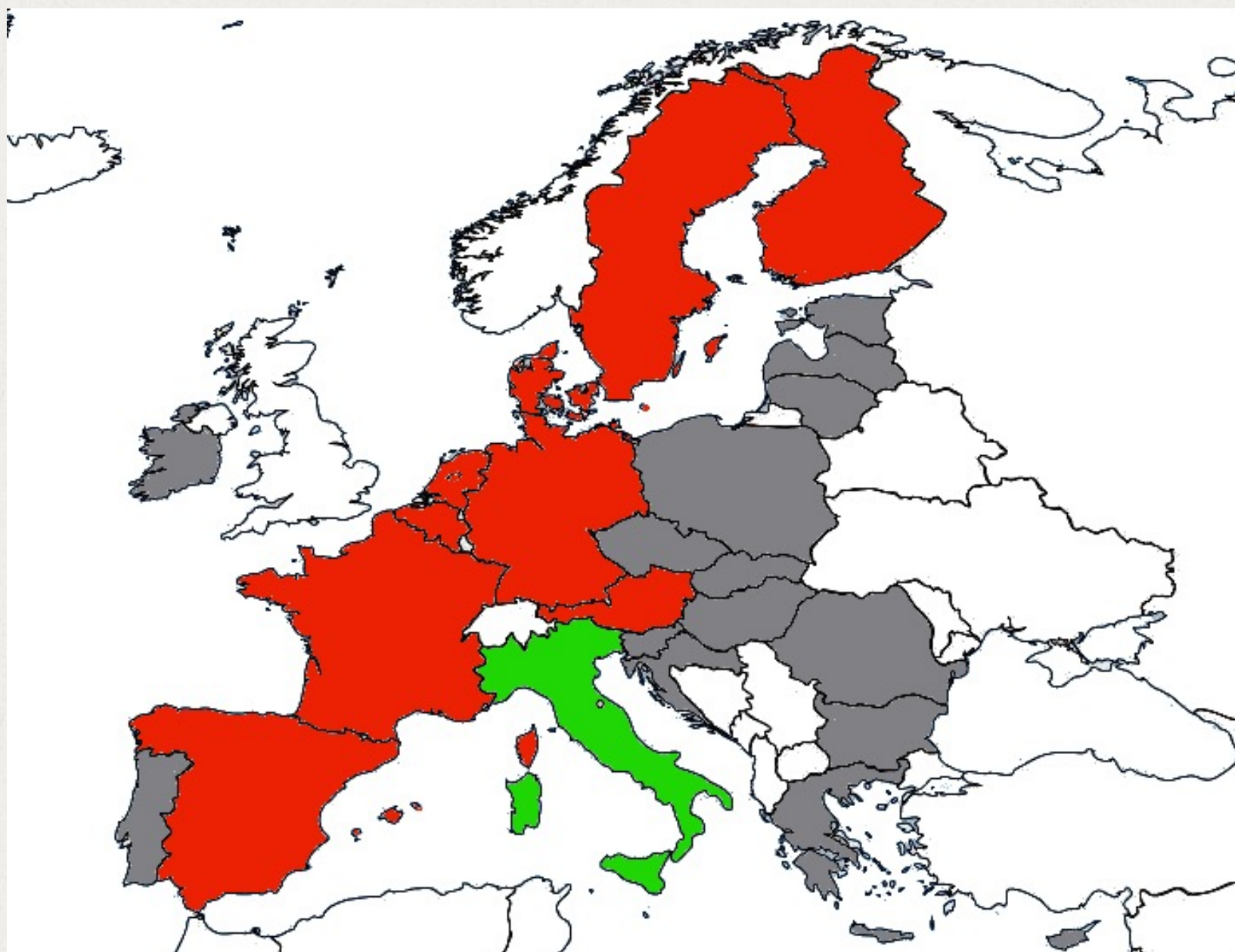


## Tina Denso

Brödermann Jahn Rechtsanwaltsgesellschaft mbH, Hamburg







## **The operation of SunnyDay's distribution network**

- The exclusive distributors undertake to develop sales in their respective countries through specialised resellers (at the wholesale and retail level). The distributors must refrain from actively promoting sales into territories granted to other exclusive distributors and into Italy.
- The purchasers established in non-exclusive countries accept SunnyDay's general conditions of sale which contain the same prohibition.
- It appears that this kind of organisation does not adequately protect the members of the distribution network against aggressive online parallel sales by third parties, as shown in the following slide.

## The Belgian distributor (Gloria) and its customer (Bluetrade)

- The Belgian exclusive distributor (**Gloria Trading sarl**), sells to a number of resellers (opticians, supermarkets, etc.) in Belgium. One of them, the company “**Bluetrade Int’l**”, has developed a very aggressive online promotion in Germany and France, proposing discounted prices which damage the actual resellers (optical shops etc.) who cannot compete, because it would severely reduce their margins.
- Gloria is also supplying large quantities of products at very favourable prices to a German company, MB Optical, which manages a network of specialised stores. These prices are made possible by the quantity discounts obtained by Bluetrade from Gloria.
- Gloria receives complaints from the German and French exclusive distributors (and their customers) and requests Bluetrade to stop these online sales.
- Bluetrade objects that under VBER 2010 (then in force) the supplier (Gloria) cannot impose territorial restrictions upon its customers, and refuses to stop the above online promotions.



## The new situation under VBER 720/2022

SunnyDay decides to consider the new VBER 720/2022 in order to strengthen the protection against parallel sales, considering in particular Article 4(b)(i) which exempts:

« ... the restriction of active sales by the exclusive distributor **and its direct customers**, into a territory or to a customer group reserved to the supplier or allocated by the supplier exclusively to a maximum of five other exclusive distributors».

SunnyDay agrees with its distributors, including Gloria Trading, to add the following clause to their exclusive distributorship agreements:

«The distributor hereby agrees to refrain from, **and to require its direct customers to refrain from**, any active sales to purchasers established in countries where other distributors of the Supplier are appointed.»

Gloria Trading requires Bluetrade to stop active online selling to German and French customers, and Bluetrade is forced to accept this request.



## The attempt to bypass the prohibition through an Estonian company

In order to overcome Bluetrade's exit from the parallel sales business, other traders try to revive this very profitable business of parallel sales.

- Bluetrade, the Belgian customer of Gloria who has been prevented to continue its online sales to Germany and France, is contacted by the German company **MB Optical GmbH**, which manages a network of specialised stores and wishes to start online sales to French and German customers through its Estonian affiliate company **MB Optical Int'l**.
- MB Optical asks Bluetrade if it is willing to supply its Estonian daughter-company and Bluetrade accepts to provide SunnyDay's products at interesting conditions, by substantially decreasing its margin.
- Thereafter MB Optical starts aggressively promoting sales in Germany and France.

## Possible remedies available to SunnyDay for preventing online sales by MB Optical

At this point SunnyDay decides to analyse possible remedies which may counter the online parallel sales by MB Optical, and envisages the following possible strategies:

- **SunnyDay could expressly reserve the remaining EU countries for itself**, according to Article 4(b)(i) of the VBER 2022, and prohibit Bluetrade to sell to MB Optical in Estonia.
- **SunnyDay could reorganise its network transforming it into a selective distribution system**, which would cover the whole EU, including the countries which have not been previously allocated to exclusive distributors.

## First Option (I)

### Express Reservation of the Remaining Eu Territories

**Article 4(b)(i), VBER 2022** exempts: « ... the restriction of active sales by the exclusive distributor and its direct customers, into a territory or to a customer group **reserved to the supplier** or allocated by the supplier exclusively to a maximum of five other exclusive distributors».

**§ 105, Guidelines 2022:** «When a territory or a customer group has not yet been exclusively allocated to one or more distributors, the supplier can reserve such a territory or customer group for itself and should inform its other distributors. This does not require the supplier to be commercially active in the reserved territory or towards the reserved customer group since the supplier may wish to reserve them for the purpose of allocating them to other distributors in the future».

We can conclude that SunnyDay has the right to reserve Estonia for other distributors or for itself in the future.

However, such reservation would only entitle SunnyDay to prohibit its direct customers (including Bluetrade) to **actively sell in Estonia**. But Bluetrade has apparently only answered MB Optical's request to be supplied, which means that it is not actively selling in Estonia, but the answer might be different within the context examined in the next slide.



## **First Option (II)**

### **Agreement between Bluetrade and MB Optical**

Let us imagine the following (not unlikely) scenario:

MB Optical has been for many years an affectionate customer of Bluetrade, which supplied it with large quantities of products at affordable prices.

When Bluetrade was forced to stop these parallel supplies, MB Optical contacted Bluetrade and proposed to start itself Bluetrade's previous business, through its Estonian daughter-company, which would be outside the territory covered by the exclusive distribution network.

When SunnyDay reserved the territory of Estonia for the future extension of the selective distribution network, Bluetrade's active sales into that territory would be prohibited, but passive sales would remain free.

Can we say that the fact of agreeing on purpose the strategy for bypassing the prohibition of active sales into France and Germany, through a third company, can have the effect of transforming Bluetrade's sales to MB Optical through MB Optical Int'l from passive sales to active sales?

## Second Option

### Selective distribution covering the whole EU

- SunnyDay would require its exclusive distributors:
  - to appoint their “prime customers” as authorised Sunny-Day resellers under a selective distribution contract entered into by the exclusive distributor in the name of SunnyDay, and
  - to stop supplying all other resellers
- In the other EU countries SunnyDay would supply directly only customers that accept to sign a selective distribution contract.
- **Thus, all companies selling SunnyDay’s products in the EU would be members of SunnyDay’s selective distribution network and the products would not be available to EU companies which do not belong to SunnyDay’s network.**
- As regards products that may be imported from outside the EU, SunnyDay would have other means to protect its network, which we are not going to analyse here.

## Third Option

### Selective distribution covering only part of the EU

Operating the selective network in the whole EU territory, may be too burdensome for a medium-sized company like SunnyDay.

The alternative solution could be that SunnyDay would continue selling to non-exclusive and non-selected distributors (free distributors) in the countries where the system is not operated, and these free distributors would accept the obligation to refrain from selling to non-members of the selective distribution network **in the countries where it is operated**.

However, the free distributors would remain free to sell to independent traders in the territory not covered by the selective distribution network, who would in turn be free to sell to non-members of the selective distribution system in the countries where it is operating.

On the other side, we must consider that the members of the selective network and their customers can be prohibited to actively or passively sell to non authorised resellers, but only **within the territory where the selective distribution system is operated**.

**Conclusion:** It would seem that the alternative of covering only part of the EU with the selective network is not to be recommended.



## Conclusions

What conclusions can we draw from the SunnyDay case? The answers of the members of the panel

