

## Panel discussion

# **Establishing a selective distribution network managed through exclusive distributors in different EU countries**

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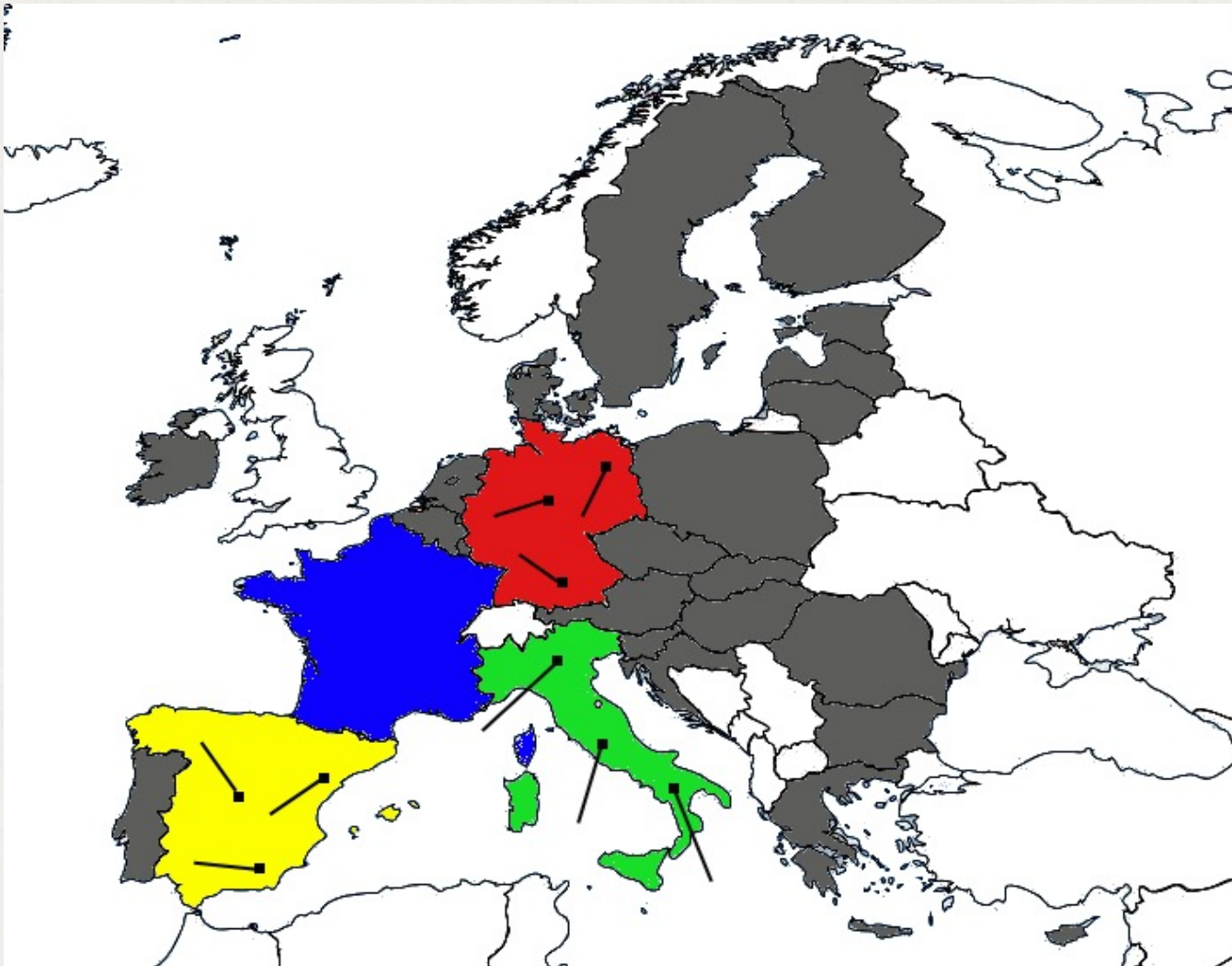
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## Parfums Marianne's business model:

Parfums Marianne decides to extend its selective distribution network to other EU countries by appointing exclusive distributors for developing and managing the network in their respective country



**distributors request Parfums Marianne to be granted an exclusive right to supply their resellers, through a prohibition imposed upon all other distributors to supply their selected resellers. Parfums is willing to grant a more limited protection by imposing upon its distributors a prohibition of active sales in the territory of other distributors.**



## I. Exclusive Distributor Agreement

(d) The Distributor shall not actively seek customers for the Products outside the Territory. Furthermore, in order to protect the high quality of distribution of the Products, the Distributor agrees not to sell the Products to retailers or dealers inside the Territory who do not meet the appropriate criteria defined in Exhibit D3. The Distributor agrees in relation to the Products not to actively seek or supply customers, not to establish any branch and not to maintain any distribution facility outside the Territory.

(e) The Distributor shall only sell the Products to retailers who undertake to sell the Products exclusively at the retail level to final customers in consumer-like quantities. The Distributor agrees to take whatever steps are necessary to be certain that the retailers do not sell the Products outside the Territory or to non authorized outlets inside the Territory. Should any of the retailers be found to be offering or selling the Products outside the Territory or inside the Territory to non authorized outlets or to dealers, the Distributor agrees to immediately cease to deliver the Products to such retailers and to take any additional actions necessary as directed by the Supplier to insure the unauthorized sales cease.

## II. Exclusive distributor Agreement

### 3.8 Respect de l'exclusivité territoriale

Sauf autorisation expresse du concédant donnée par avenant, le concessionnaire s'interdit expressément d'exercer les droits concédés, directement ou indirectement en dehors du Territoire.

En conséquence, le concessionnaire s'interdit expressément, à titre de disposition déterminante de l'engagement du concédant dans le cadre du présent contrat, de, en dehors du Territoire:

- vendre les « Produits »,
- mener une politique active de prospection de clients, à quelque titre et sous quelque qualité que ce soit, directement ou indirectement,
- se livrer à une quelconque action active de promotion ou de publicité,
- constituer une filiale ou un entrepôt de distribution.

Le concessionnaire s'engage expressément à faire respecter par ses sous distributeurs l'exclusivité territoriale qui lui a été concédée et à leur interdire, en conséquence, de se livrer à une politique active de vente hors du territoire.

En conséquence, le concessionnaire s'engage à résilier tout contrat avec des distributeurs ayant une politique active de vente hors du Territoire et à communiquer au concédant toute information relative à la violation de l'exclusivité territoriale concédée dans le cadre de la présente licence.

## II. Exclusive distributor Agreement

### 4.1 Exclusivité

Le concédant s'engage à n'accorder dans le Territoire tel que défini à l'article 2, aucune autre concession pour les «Produits » tels que définis à l'article 1.

Le concédant s'engage à faire respecter par les tiers l'exclusivité accordée au concessionnaire en interdisant la prospection et les ventes actives par des tiers sur le Territoire.



### **III. Exclusive distributor Agreement**

If the Territory is located in a country that is within the European Union the Distributor agrees not to actively solicit or accept any order for Products from:

- any person or entity located outside the European Union; or
- any person or entity that is located in another country within the European Union unless it is an approved Retailer approved in writing by SUPPLIER in that country or a distributor appointed by SUPPLIER for that country (i.e., it is an entity that is within SUPPLIER's selective distribution network).

## **Exclusive Distributor Agreement**

- Can Marianne Parfum prohibit all other distributors to supply the selected resellers in the other countries?
- Can Marianne Parfum impose on its distributors a prohibition of active sales in the territory of other distributors?

# The EU competition rules

## Definitions

Art 1(e) BER 2010	Art 1(g) and (h) BER 2022
<p>1. For the purposes of this Regulation, the following definitions shall apply:</p> <p>(...) (e) <b>‘selective distribution system’</b> means a distribution system where the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to distributors selected on the basis of specified criteria and where these distributors undertake not to sell such goods or services to unauthorised distributors within the territory reserved by the supplier to operate that system; (...)</p>	<p>1. For the purposes of this Regulation, the following definitions shall apply:</p> <p>(g) <b>‘selective distribution system’</b> means a distribution system where the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to distributors selected on the basis of specified criteria and where these distributors undertake not to sell such goods or services to unauthorised distributors within the territory reserved by the supplier to operate that system;</p> <p>(h) <b>‘exclusive distribution system’</b> means a distribution system where the supplier allocates a territory or group of customers exclusively to itself or to a maximum of five buyers <b>and restricts all its other buyers from actively selling into the exclusive territory or to the exclusive customer group;</b></p>



# The EU competition rules

## Hardcore restrictions

<i>Art 4(b) BER 2010</i>	<i>Art 4(b) BER 2022</i>
<p><i>The exemption provided for in Article 2 shall not apply to vertical agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:</i></p> <p><i>(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></p> <p><i>(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, <b>where such a restriction does not limit sales by the customers of the buyer,</b></i></p> <p><i>(ii) the restriction of sales to end users by a buyer operating at the wholesale level of trade,</i></p> <p><i>(iii) the restriction of sales by the members of a selective distribution system to unauthorised distributors within the territory reserved by the supplier to operate that system, and</i></p> <p><i>(...)</i></p>	<p><i>The exemption provided for in Article 2 shall not apply to vertical agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:</i></p> <p><i>(b) <b>where the supplier operates an exclusive distribution system,</b> the restriction of the territory into which, or of the customers to whom, the exclusive distributor may actively or passively sell the contract goods or services, except:</i></p> <p><i>(i) 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 <b>allocated by the supplier exclusively</b> to a maximum of five other exclusive distributors;</i></p> <p><i>(ii) the restriction of active or passive sales by the exclusive distributor and its customers to unauthorised distributors located in a territory where the supplier operates a selective distribution system for the contract goods or services;</i></p> <p><i>(...)</i></p> <p><i>(iv) the restriction of active or passive sales to end users by an exclusive distributor operating at the wholesale level of trade; (...)</i></p>

# The EU competition rules

## Hardcore restrictions

<i>Art 4(c), (d) BER 2010</i>	<i>Art 4 (c) BER 2022</i>
<p><i>(d) the restriction of cross-supplies between distributors within a selective distribution system, including between distributors operating at different level of trade; (...)</i></p> <p><i>(c) the restriction of active or passive sales to end users by members of a selective distribution system operating at the retail level of trade, without prejudice to the possibility of prohibiting a member of the system from operating out of an unauthorised place of establishment;</i></p>	<p><i>(...)</i></p> <p><i>(c) where the supplier operates a selective distribution system,</i></p> <p><i>(i) the restriction of the territory into which, or of the customers to whom, the members of the selective distribution system may actively or passively sell the contract goods or services, except:</i></p> <p><i>(1) the restriction of active sales by the members of the selective distribution system and their 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 exclusive distributors;</i></p> <p><i>(2) the restriction of active or passive sales by the members of the selective distribution system and their customers to unauthorised distributors located within the territory where the selective distribution system is operated;</i></p> <p><i>(ii) the restriction of cross-supplies between the members of the selective distribution system operating at the same or different levels of trade;</i></p> <p><i>(iii) the restriction of active or passive sales to end users by members of the selective distribution system operating at the retail level of trade, without prejudice to points (c)(i)(1) and (3);</i></p>

# The EU competition rules

## Combination exclusive/selective distribution

*Paragraphs 152 and 176 Guidelines BER 2010*

*(152) Exclusive distribution is exempted by the Block Exemption Regulation where both the supplier's and buyer's market share each do not exceed 30 %, even if combined with other non-hardcore vertical restraints, such as a non-compete obligation limited to five years, quantity forcing or exclusive purchasing. **A combination of exclusive distribution and selective distribution is only exempted by the Block Exemption Regulation if active selling in other territories is not restricted. (...)***

*(176) Qualitative and quantitative selective distribution is exempted by the Block Exemption Regulation as long as the market share of both supplier and buyer each do not exceed 30 %, **even if combined with other non- hardcore vertical restraints, such as non-compete or exclusive distribution, provided active selling by the authorised distributors to each other and to end users is not restricted. (...)***



# The EU competition rules

## Combination exclusive/selective distribution

*Paragraphs 236 and 237 Guidelines BER 2022*

***(236) The combination of selective distribution with exclusive distribution in the same territory cannot benefit from the exemption provided by Article 2(1) of Regulation (EU) X, including where the supplier applies exclusive distribution at the wholesale level and selective distribution at the retail level. This is because such a combination would require the authorised distributors to accept hardcore restrictions within the meaning of Article 4, point (b) or (c) of Regulation (EU) X, for example, restrictions of active sales to territories or customers that have not been exclusively allocated, restrictions of active or passive sales to end users, or restrictions of cross-supplies between authorised distributors. However, the supplier may commit to supply only certain authorised distributors, for example, in certain parts of the territory where the selective distribution system is operated, or it may commit not to make any direct sales in that territory itself. Pursuant to the third exception to Article 4, point (c)(i) of Regulation (EU) X, the supplier may also impose a location clause on its authorised distributors.***

***(237) The hardcore restriction set out in Article 4, point (c)(ii) of Regulation (EU) X concerns the restriction of cross-supplies between authorised distributors within a selective distribution system. This means that the supplier cannot prevent active or passive sales between its authorised distributors, which must remain free to purchase the contract products from other authorised distributors within the network, operating either at the same or at a different level of trade<sup>146</sup>. Consequently, **selective distribution cannot be combined with vertical restraints aimed at forcing distributors to purchase the contract products exclusively from a given source. It also means that, in a selective distribution system, the supplier cannot restrict sales by authorised wholesalers to authorised distributors.*****

# The EU competition rules

## Guidelines BER 2022

*(220) The investment incentives of exclusive distributors could also be undermined by active selling by customers of the supplier's other buyers. Therefore, Article 4, point (b)(i) of Regulation (EU) X also allows the supplier to require its other buyers to restrict their direct customers from actively selling into territories or to customer groups that the supplier has exclusively allocated to other distributors or reserved to itself. However, the supplier may not require such other buyers to pass on the active sales restrictions to customers further down the distribution chain.*

*(223) Second, Article 4, point (b)(ii) of Regulation (EU) X allows a supplier that operates an exclusive distribution system in a certain territory and a selective distribution system in another territory to restrict its exclusive distributors from selling actively or passively to unauthorised distributors located in the territory where the supplier already operates a selective distribution system or which it has reserved for the operation of such a system. The supplier may also require its exclusive distributors to similarly restrict their customers from making active and passive sales to unauthorised distributors in territories where the supplier operates a selective distribution system or which it has reserved for that purpose. The ability to pass on active and passive sales restrictions further down the distribution chain in this scenario is intended to protect the closed nature of selective distribution systems.*

*(229) The first exception concerns restrictions of the ability of authorised distributors to sell outside the selective distribution system. It allows the supplier to restrict active sales, including targeted online advertising, by authorised distributors into other territories or to customer groups that are exclusively allocated to other distributors or reserved to the supplier. The supplier may also require the authorised distributors to impose such permitted restrictions of active sales on their direct customers. However, the protection of such exclusively allocated territories or customer groups is not absolute, as the supplier may not restrict passive sales into such territories or to such customer groups.*

*(230) The second exception allows the supplier to restrict its authorised distributors and their customers from making active or passive sales to unauthorised distributors located in any territory where the supplier operates a selective distribution system.*

*(234) The hardcore restriction set out in Article 4, point (c)(iii) of Regulation (EU) X concerns the restriction of active or passive sales to end users by members of a selective distribution system operating at the retail level. This means that the supplier may not restrict its authorised distributors from selling to end users, or to purchasing agents acting on behalf of end users, except where such end users are located in a territory or belong to a customer group that has been exclusively allocated to another distributor or reserved to the supplier in a territory where the supplier operates an exclusive distribution system (see Article 4, point (c)(i)(1) of the Regulation and paragraph (229). (...)*

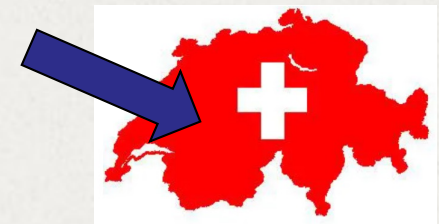


## The Swiss point of view (I)

### APPLICABILITY OF SWISS LAW

Impact principle: Swiss antitrust law applicable if **possible impact** on Switzerland / Swiss market (Art. 2 para. 2 Cartel Act: "*practices that have an effect in Switzerland, even if they originate in another country*"), e.g.:

- contracting parties in Switzerland, contract/subject matter affects Switzerland
- contracting parties abroad, contract/subject matter affects Switzerland





## The Swiss point of view (II)

### MARKET FORECLOSURE / TERRITORIAL RESTRICTIONS

Art. 5 para. 4 Cartel Act:

*"The elimination of effective competition is also presumed in the case of agreements between undertakings at different levels of the production and distribution chain regarding fixed or minimum prices, and in the case of agreements contained in distribution contracts regarding the allocation of territories to the extent that **sales** by other distributors into these territories are not permitted."*

- also covers territorial restrictions that are imposed on traders outside Switzerland, provided that they may have an impact on Switzerland (e.g. GABA case).
- **potential** to affect competition is sufficient

Assessment of other agreements on the allocation of territories: Art. 5 para. 1 Cartel Act:

*"Agreements that significantly restrict competition in a market for specific goods or services and are not justified on grounds of economic efficiency, and all agreements that eliminate effective competition are unlawful."*

## The Swiss point of view (III)

SELECTIVE DISTRIBUTION – SIGNIFICANT RESTRICTION OF COMPETITION  
(Section 12.2 VertBek):

- (c) **Restriction of active or passive sales to end consumers** by authorized dealers at the retail level (however, permitted: prohibition to conduct business from unauthorized branches)
- (d) **Restriction of cross-supplies between authorized dealers (at the same or different market level) within the selective distribution system**
  - Swiss dealers should be free to purchase from other authorized dealers outside Switzerland
  - procurement from non-authorized distributors may be prohibited
  - caution: in countries with open distribution (neither selective nor exclusive), all dealers are "authorized dealers" from a Swiss law point of view

## The Swiss point of view (IV)

SELECTIVE DISTRIBUTION – SIGNIFICANT RESTRICTION OF COMPETITION  
(Section 12.2 VertBek):

Section 12.2 lit. c and d VertBek imply that the combination of exclusive and selective distribution in a territory **is usually qualitatively severe** if active selling is restricted.

→ **i.e. unlawful** if not justified on grounds of economic efficiency

If, on the other hand, active sales are **not** restricted, the combination of exclusive and selective distribution does **not** constitute a qualitatively serious restriction of competition.

For example, a qualitatively serious restriction of competition may exist if a manufacturer **combines exclusive distribution at the wholesale level with selective distribution at the retail level** in a territory and prohibits wholesalers from actively selling in territories other than those allocated to them.



## Possible alternatives solutions draft provisions?

1. The distributors request Parfums Marianne to be granted an exclusive right to supply their resellers, through a prohibition imposed upon all other distributors to supply their selected resellers. Is this possible?

- Usually not.

2. Parfums is willing to grant a more limited protection by imposing upon its distributors a prohibition of active sales in the territory of other distributors. Is this possible?

- Usually not.

*Note: assumption that agreement does not fall within the thresholds set out in Effect on Trade Guidelines or the De Minimis Notice, or that we are not dealing with agreements between SMEs.*

## Possible alternatives solutions draft provisions?

*VBER Guidelines 236: “The combination of selective distribution with exclusive distribution in the same territory cannot benefit from the exemption provided by Article 2(1)”*

## Possible alternatives solutions draft provisions?

### Possible alternatives?

- Same structure (one distributor per country with selective distribution model at retail level) but:
  - with freedom of distributors and retailers to cross-sell to other authorised distributors/retailers; and
  - with ability of PM to restrict its distributors from actively or passively selling to end users.
- PM could set up subsidiaries in each national market for distribution (given that the above distribution model may provide insufficient incentives for national distributors).
- Selective distribution in some national markets, and exclusive distribution in others.
  - PM could restrict members of selective distribution system to *actively* sell into territories covered by exclusive distribution.
  - PM could restrict exclusive distributors (and their customers) from active or passive sales to unauthorised distributors in the territories covered by selective distribution.





International Distribution Institute

*Thank you!*