



International Distribution Institute

# **THE IMPACT OF THE NEW EU ANTITRUST RULES ON FRANCHISING CONTRACTS**

**Silvia Bortolotti, Buffa Bortolotti & Mathis, Turin**

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## SUMMARY

- Dual distribution
- Franchisor providing online intermediation services to its franchisees
- Territorial restrictions:
  - Selective system
  - Exclusive system
- New definition of active sales
- Online restrictions

## DUAL DISTRIBUTION IN FRANCHISING (1)

Art. 2.4 of Reg. 330/2010 and of Reg. 720/2022:

Vertical agreements between franchisor and franchisees:

- are typically non-reciprocal and
- are exempted because they are competitors at the downstream level, but not at the upstream level

New Art. 2.5 of Reg. 720/2022:

In order to be exempted, the exchange of information between the supplier and the buyer must be:

- either directly related to the implementation of the vertical agreement or
- necessary to improve the production or distribution of the contract goods or services

## DUAL DISTRIBUTION IN FRANCHISING (2)

Information that is likely to fulfill the two conditions (VGL 99):

- technical information
- logistical information
- customer purchases, preferences, feedback, if not restrictive
- selling price
- recommendations or maximum reselling price, if not restrictive
- marketing, promotional campaigns, new products
- performance-related information, even of other buyers, with limitations; volume or value of the buyer's sales vs competing goods

## DUAL DISTRIBUTION IN FRANCHISING (3)

Information that is unlikely to fulfill the two conditions (VGL 100):

- future selling/reselling price applicable downstream
- information on identified end users, if not necessary to:
  - specific needs, e.g. special conditions, adaptations, loyalty programs, after-sale service
  - monitoring compliance with selective or exclusive distribution agreements
- information on goods sold by buyer under its own brand, if not produced by the seller/manufacturer

## DUAL DISTRIBUTION IN FRANCHISING (4)

In franchise agreements, the exchange of information is often justified by the need to keep and maintain a uniform business model across the franchise network (VGL 98)

CONSEQUENCES, in case the exchange of information does not fulfill the two conditions (VGL 102-103):

- individual assessment
- possible application of the De Minimis Notice
- the other provisions of the vertical agreement can still benefit from the exemption

Taking precautions to minimize risks

## **FRANCHISOR ACTING AS ONLINE INTERMEDIATION SERVICE PROVIDER**

Franchisor allowing and facilitating sales between its franchisees and end-users on its own platform which - at the same time - is selling the same products through the platform in competition with the franchisees (hybrid function).

In principle, it cannot benefit from the exceptions on dual distribution (Articles 2.6 and 2.4 VBER), with the consequences previously indicated.

If there is no restriction by object or significant market power (in the relevant market for the provision of online services for such goods and services), it is unlikely that the Commission will prioritize enforcement action (VGL 109)

## VERTICAL RESTRAINTS IN FRANCHISE AGREEMENTS

Franchise agreements, due to their specific characteristics, in most cases fall outside the scope of Article 101(1) of the Treaty (VGL 166, Pronuptia); even in the framework of the VBER those specificities are taken into account, e.g.:

- ok, non compete obligation (mono-brand) and extended to the duration of the franchise agreement (already before)
- ok, other provisions necessary for maintaining the uniformity of the network (already before)
- Importance of the transfer of know-how, e.g. for post-term non compete obligation (already before)



## TERRITORIAL RESTRICTIONS

Depending on the distribution model chosen by the franchisor (e.g. selective or exclusive), the relevant rules on territorial restriction will apply (VGL § 167).

### 1) What is a selective franchise system?

«(..) a franchise agreement that results in a closed network, where the franchisees are prohibited from selling to non-franchisees, must be assessed under the principles applicable to selective distribution».

### 2) What is an exclusive franchise system?

«(..) a franchise agreement that (..) grants territorial exclusivity and protection from active sales by other franchisees must be assessed under the principles applicable to exclusive distribution».

## TERRITORIAL RESTRICTIONS SELECTIVE NETWORK (1)

### Art. 4.1, (c) Reg. 720/2022:

- Franchisees (and customers?) can be restricted from making ACTIVE sales to exclusive territories (allocated to other buyers or to the supplier) outside the franchise/selective system;
- Franchisees (and customers?) can be restricted from making ACTIVE and PASSIVE sales to non-authorized resellers within the franchise/selective system;
- Franchisees must remain free to make ACTIVE and PASSIVE sales to any other authorized franchisee at all levels, as well as to end-users within the system;
- Possible protection from the outside to non-authorized franchisees;
- Possible restriction for the wholesalers (master fr. ?) to sell to end users (already before);
- Possible location clause (already before, not covering online sales).

## TERRITORIAL RESTRICTIONS SELECTIVE NETWORK (2)

Possible critical issues:

- Which territory is covered by the franchise system?
- Reservation of a territory for future expansion of the franchise/selective system
- Coordination with different distribution channels on other territories
- Prohibition to merge exclusive and selective systems, e.g.:
  - franchisees supplied from one master in a specific territory;
  - territorial protection granted to the franchisee in the framework of a selective franchise system

Essential to have a good and coordinated strategy

## TERRITORIAL RESTRICTIONS EXCLUSIVE SYSTEM

### Art. 4.1 (b) Reg. 720/2022:

- Franchisees (and customers?) can be restricted from making ACTIVE sales to other exclusive franchisees as well as to other exclusive «buyers» or to an exclusive territory allocated to the supplier;
- Franchisees (and customers?) can be restricted from making ACTIVE and PASSIVE sales to non-authorized resellers of a possible selective system;
- Possible location clause (already before, not covering online sales);
- Possible protection from ACTIVE SALES in the exclusive territory of the franchisee from the outside;
- Shared exclusivity: no more than 5 franchisees – active and passive sales to be left free among them.

## NEW DEFINITION OF ACTIVE SALES

Broader definition of 'active sales': Art. 1.1 (I) Reg. 720/2022:

«'active sales' means actively targeting customers by visits, letters, emails, calls or other means of direct communication or through targeted advertising and promotion, offline or online, for instance by means of **print or digital media, including online media, price comparison services or advertising on search engines targeting customers in particular territories or customer groups**, operating a **website with a top-level domain corresponding to particular territories**, or **offering on a website languages that are commonly used in particular territories**, where such languages are different from the ones commonly used in the territory in which the buyer is established»

## NEW DEFINITION OF ‘ONLINE RESTRICTIONS’

Art. 4.1 (e) Reg. 720/2022; VGL § 203 ss.:

Vertical agreements which directly or indirectly have as their object:

«the prevention of the effective use of the internet by the buyer or its customers to sell the contract goods or services, as it restricts the territory into which or the customers to whom the contract goods or services may be sold within the meaning of points (b), (c) or (d), without prejudice to the possibility of imposing on the buyer:

- (i) other restrictions of online sales; or
- (ii) restrictions of online advertising that do not have the object of preventing the use of an entire online advertising channel;»

## **‘ONLINE RESTRICTIONS’ ADMITTED**

Specific restrictions allowed, subject to certain conditions (VGL § 207 ss.)

- Quality standards on online sales
- Prohibition to sell in specific marketplaces
- Having one or more brick & mortar shops or showrooms
- Selling a minimum quantity of products offline (objective criteria)
- Charge a different wholesale price for online and offline sales (for different investments and costs)

Always, however, with attention to the cumulative effect of the restrictions

**Thanks for your kind attention!**

**Silvia Bortolotti**

Buffa Bortolotti & Mathis, Turin; Secretary General IDI,  
IDI country expert for Italy