



International Distribution Institute

# Active and passive sales revisited

Actual issues regarding the  
practical aspects of this distinction

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# The origin of the issue in question

- **First step: distinguishing open and closed exclusivities**
  - The 1966 judgments of the European Court: exclusivity with *territorial protection* is contrary to art. 101 (at the time art. 85).
  - Exclusive agreements which leave space for parallel imports do not restrict competition.
  - The distributor has the exclusive right to purchase directly from the supplier, but he cannot be protected against parallel sales by others (e.g. wholesalers or distributors of other countries).
- **Second step: the 67/67 block exemption**
  - The supplier may impose upon the distributor the **obligation to refrain, outside the territory covered by the contract, from seeking customers for the goods to which the contract relates, from establishing any branch, or from maintaining any distribution depot.**
  - **The notion of active sales is born.**

# The position taken in Regulation 330/2010

## Art. 4 (b) hardcore clauses

- **Prohibition:** Agreements which have as their object 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**,
- **Exception:** 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, **where such a restriction does not limit sales by the customers of the buyer.**

## Changes introduced after the first BER

- **Sales outside the territory ----- sales into exclusive territory of others**
- **No limitations imposed upon buyers**



# The changes introduced in Reg. 720/2022

## Exclusive distribution

- **Prohibition:** Agreements which have as their object the **restriction of the territory into which**, or of the customers to whom the exclusive distributor may **actively or passively** sell the contract goods nor services,
- **Exception:** 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;
- **Passing on:** the prohibition of active sales can be **extended to customers of the distributor (passing-on):**
- **Reserved territories** the prohibition of active sales is admitted only with respect to **territories allotted exclusively** to the supplier or to other resellers.



# The distinction between active and passive sales

## Art. 1(1)(l) and Art. 1(1)(m)

**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;

**Passive sales** means sales made **in response to unsolicited requests** from individual customers, including delivery of goods or services to the customer, without the sale having been initiated by actively targeting the particular customer, customer group or territory, and including sales resulting from participating in public procurement or responding to private invitations to tender.



## Flash E-Bikes

### Presentation of the mock case

Flash E-Bikes Company ("Flash") is active in the European market for both the sale and the repair & maintenance of Flash electric bikes (e-bikes), including the sale of spare parts. It has set up a network of a few authorized resellers ("Flash Dealers") and many more authorized repairers ("Flash Repairers"), as a result of which a customer will not need to drive more than 15 minutes to arrive at the repair shop of the Flash Repairer.

Flash has granted each Flash Dealer and Flash Repairer an exclusive territory, so that they can earn back their investments in the showroom, workshop, tools, stock, training, etc. The exclusive territories of the Flash Dealers are bigger than those of the Flash Repairers. Active sales of e-bikes or repair & maintenance services of e-bikes outside the exclusive territory are forbidden.

A Dutch courier that operates in the Benelux ("Speedy") is interested to purchase Flash e-bikes. He turns to the Belgian Flash Dealer, although the headquarters of Speedy are in Amsterdam. The Belgian Flash Dealer offers to sell the e-bikes at very attractive prices, and much more...

## Flash E-Bikes

### Commercial offers – can passive become active?

1. The Belgian Flash Dealer wants to sell the e-bikes with a buy-back option after two years. He wants to use that in order to make an offer for the sale of a new e-bike. Is this allowed?
2. The Belgian Flash Dealer sells the e-bikes without a buy-back option, but with a Flash maintenance contract, as a result of which there have been regular contacts between the Flash Dealer (who is also a Flash Repairer) and Speedy. What if, during these contacts, the Flash Dealer offers new e-bikes for sale?
3. The Belgian Flash Dealer sells the e-bikes without a buy-back option, but wants to send Speedy a voucher for a new e-bike two years after the sales. Is this allowed? What if the Flash Dealer send a voucher to all its customers? Does that make a difference?



## Flash E-Bikes

### Complaints of other members of the distribution network – how to react?

4. The Dutch Flash Dealer starts to complain with Flash about his Belgian colleague selling outside his exclusive territory. He considers Speedy as his exclusive potential customer. How should Flash react?

### Mobile services

5. Flash manages to talk to the Belgian Flash Dealer in order to curb active sales outside Belgium. The Belgian Flash Dealer now starts a mobile repair service, in combination with a multi-lingual website (including French, English, German and Dutch). He is very successful. Should there be any boundaries as to where the vans of the authorized repairer can go to carry out mobile repair services? Can they cross the border with Holland? Should Flash resume talks with the Belgian Flash Dealer to curb its entrepreneurship and territorial reach?

## Flash E-Bikes

### Reorganisation of the distribution network – what are the options?

6. Flash is tired about all these conflicts between its Flash Dealers and Flash Repairers, which also occur outside the Benelux. It wants to reorganize its network in order to solve these issues. Will the set-up of a selective distribution network bring a solution?
6. Will the set-up of a network of (genuine) sales and repair agents bring a solution?
7. Flash is not sure what to do and wants to give it a try first in Holland, leaving the rest of Europe as it is. Is this a good idea? What should Flash do to make this pilot a success?

## Thank you for your attention!



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