

COUNTDOWN | 3 May 2022

Distribution Law Center Countdown XX - Selective distribution (Reverse protection)

What?

As explained in prior countdowns (see [DLC countdown 12](#), [DLC countdown 13](#) and [DLC countdown 14](#)) the notions of “active sales” (to actively target individual customers) and “passive sales” (to respond to unsolicited requests from individual customers) are pivotal to the world of vertical agreements.

In principle, buyers should be allowed to actively and passively sale as they see fit. This is why under the Vertical Block Exemption Regulation (the “VBER”), restrictions of the territory into which, or the customers groups to whom, the buyer can sell are generally deemed as hardcore restrictions and are prohibited. However, there are limited exceptions to these hardcore restrictions linked to the protection of exclusive and, to a lesser extent, selective distribution systems.

In an exclusive distribution system, the supplier allocates a territory or customer group exclusively to an exclusive distributor who is then protected from competing active sales into the exclusive territory or to the exclusive customer group by the supplier or by other distributors. In a selective distribution system the supplier undertakes to sell the contract products, either directly or indirectly, only to distributors who satisfy certain objective criteria and who cannot resell to third party resellers who are not part of the selective distribution system. Selective distributors are free however to sell to all end-users without limitation.

A supplier can choose the preferred way to distribute its products and this might be via an exclusive distribution system, a selective distribution system, an open distribution system that is non-exclusive/non-selective or any combination of the above (when distributing its products in different territories).

But what happens when the supplier has opted to apply a ‘hybrid’ distribution system, namely one which includes both exclusive as well as selective distributors, depending on the territory or customer group? This countdown addresses the amendments introduced by the new VBER regarding the instances where an active and/or passive sales prohibition may be imposed within ‘hybrid’ distribution systems, as a means to practically facilitate and better protect their co-existence.

Now?

Under the current VBER regime, an exclusive distributor is protected against active sales, meaning that

distributors outside the exclusive territory/customer group to actively pursue sales in the exclusive territory/customer group assigned to the exclusive distributor.

This applies to hybrid distribution systems as well. Whilst selective distributors cannot be restricted as to the customers to whom they sell (Article 4(c) of the VBER), the Vertical Guidelines (Guidelines) confirm in paragraph 56 that a supplier is allowed to prohibit its selective distributors to pursue active sales in territories where the supplier has appointed an exclusive distributor.

The opposite does not apply. Under the VBER and Guidelines, a selective distributor does not enjoy protection against active or passive sales from distributors outside the selective territory, irrespective of whether they are exclusive or unauthorised distributors.

The future as of 1 June 2022?

When exclusive or non-exclusive and selective distribution systems exist in parallel, the new VBER establishes a framework that protects selective distribution systems from exclusive or non-exclusive distributors, and exclusive distribution systems from selective distributors (reverse protection system).

In particular, draft articles 4(b)(ii) and 4(d)(ii) VBER allows a supplier to protect its selective distribution system in one territory by preventing active and passive sales to unauthorised distributors in that territory by exclusive or non-exclusive distributors located outside that territory. Like before, draft article 4(c)(i) VBER allows the supplier to protect its exclusive distribution system in a given territory against active sales by members of a selective distribution system operating in another territory.

In both cases, there is a pass on possibility meaning that the supplier may require that the exclusive and non-exclusive distributor passes its obligation under 4(b)(ii) and 4(d)(ii) VBER to its customers and that the selective distributor passes on its obligation under 4(c)(i) VBER to its customers that have entered into a distribution agreement with the supplier or with a party that was given distribution rights by the supplier.

In practice?

By way of example, a supplier of watches may have established an exclusive distribution system in member state A (appointing exclusive distributor A), whereas in all other member states he operates a selective distribution system. The supplier can oblige exclusive distributor A (as well as all customers of A) not to actively sell to or respond to unsolicited requests by unauthorised distributors in the other member states (new article 4(b)(ii)). That way, selective distributors are protected from sales to unauthorised distributors active in their territories. At the same time, the supplier can impose on all members of its selective distribution systems to not actively sell

watches in member state A, thereby protecting A's exclusive territory (new article 4(c)(i) first hyphen).

Under the current VBER, exclusive distributor A could actively and passively sell to unauthorised distributors located in the selective territory, or to unauthorised distributors in its own territory, for subsequent sales to unauthorised distributors in the selective territory, without the possibility for the supplier to protect selective distributors against such sales.

Assessment?

The draft article 4(c)(1) mirrors draft Articles 4(b)(ii) and 4(d)(ii), which allows businesses to adopt hybrid systems of distribution across the EU that will respond better to the genuine needs of their businesses.

As exclusive distribution systems were already shielded from active sales, the new articles constitute a major novelty in relation to the protection of selective distribution systems from both active and passive sales coming from exclusive or non-exclusive territories.

All in all, the established reverse protection system reveals the more flexible approach adopted by the Commission that intends to practically facilitate and protect the co-existence of these two distribution systems and their protection from one another, ensuring that choices lawfully made under the block exemption are not undermined as a consequence of the fact that a single distribution system is not implemented across the whole of the EEA.

It remains to see how these provisions will be applied and interact with the remaining amendments regarding active/passive sales. Perhaps the new Guidelines could provide a few examples of the practical implementation of the new framework.

Want to know more? Stay tuned...

Counting down towards 1 June 2022 we aim to provide you with regular updates and the necessary legal knowhow in order to fully prepare your business for the future. Please also check out the [Distribution Law Center](#) platform and our [LinkedIn](#) page for much more information on the laws governing vertical agreements, covering both competition and commercial law. 27 specialized teams from all over the EEA are working hard to turn the platform into your favourite source of guidance and information.

A translation of this Countdown newsletter is available in the following languages: [Czech](#), [Romanian](#), [Slovak](#), [Spanish](#), [Swedish](#).

Read the available DLC Countdown newsletters on the changes to be expected [here](#).