CONSIDERATIONS BY IDI IN VIEW OF THE REVISION OF VBER 330/2010

1. INTRODUCTION

The **International Distribution Institute (IDI)** is the leading association dealing worldwide with legal aspects of international distribution. The Institute provides information about legislation and case law regarding distribution (agency distributorship, franchising, etc.) in around 140 countries and organises yearly conferences where topical issues are discussed with its members. IDI is currently updating its members about EU competition developments regarding distribution through its Report on EU Antitrust Law, available to IDI subscribers[1].

Members of IDI are mainly **in-house counsels** of companies operating international distribution networks and **lawyers in private practice** specialized in this field. Companies involved in IDI distribute their products and services through many different distribution models (e.g. commercial agents, exclusive/non-exclusive wholesale distributors; selective distributions networks; direct franchising; master franchising; area developers; etc.).

Our members are aware of the impact of competition rules on their networks and are engaged to organise distribution in conformity with such rules. However, when the application of such rules seriously affects the proper functioning of their distribution networks, suppliers/principals are put in a very difficult situation and may be forced to look for alternative solutions, which will not always be satisfactory for marketing efficiently their products and/or services.

Especially in recent years, **the development of internet sales has seriously affected the operation of distribution networks**. While the internet has favoured an easier access of suppliers to the market, to the advantage of competition and, finally, to the benefit of consumers, it has at the same time opened the door to aggressive forms of competition, which may disrupt or seriously jeopardise the functioning of existing networks.

Our members believe that it is necessary to find a **reasonable compromise** between the need to warrant the maximum freedom of competition and the need of suppliers to market their products through an efficient distribution network, by admitting restrictive practices which are necessary for obtaining an equitable balance between these two requirements. This is especially the case for SME's which need to be put in the condition to maintain a certain level of protection of their distribution networks, in order to preserve the value of their products and services.

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1 Antitrust rules of the European Union applicable to distribution. Agency, distributorship, selective distribution and franchising, updated at June 2019.

In our view, the block exemption system plays an essential role in this context. Its function as a safe harbour and as a guideline for companies is of paramount importance for business and should be further be developed, taking into account the actual needs of distribution networks.

IDI would like to share some of the preoccupations of its members with regard to the present and future policies in this field.

2. HARDCORE RESTRICTIONS AND RESTRICTIONS BY OBJECT

Regulation 330/2010 defines in Article 4 a number of "hardcore restrictions" which exclude the benefit of the block exemption. The difference between the category of hardcore restrictions and restrictions by object is of the utmost importance and should be maintained, or even strengthened. We would strongly oppose the idea to replace specifically listed restrictions **by a general notion of restrictions by object.** The approach followed in the revised the *de minimis* notice should not be transposed in the VBER and he notion of "restriction by object" **should not be used in the context of a block exemption**, which must warrant to users **clarity and foreseeability**.

It would therefore be preferable to maintain the approach followed in Article 4 of Regulation 330/2010, by expressly defining restrictive practices which preclude the benefit of the block exemption.

In addition to this, Article 4 could be redrafted in a more precise way in order to **avoid extensive interpretations** (like those proposed by the German Competition Authority with particular reference to the Coty case), which go against the very purpose (safe harbour) of the block exemption.

For RPM, an exception might be added for minimum advertised prices in selective distribution systems, in order to preserve the effectiveness of the system.

3. ACTIVE/PASSIVE SALES AND INTERNET

A crucial issue is to decide how the traditional distinction between active and passive sales should be applied in the context of internet sales

The Commission's established principle is that sales through the internet are **passive sales**, "since it is a reasonable way to allow customers to reach the distributor" and "effects that extend beyond the distributor's own territory... result from the technology allowing easy access from everywhere".

This reasoning is **disputable if we look at the actual functioning of sales through internet** and does not take sufficiently into account the reality of business.

The original purpose of leaving the distributor free to make passive sales was (and is still) to warrant the free circulation of the products through parallel imports, and to grant at the same time a limited protection to exclusive distributors, by prohibiting the members of the network to actively promote sales to exclusive territories of other distributors. The distributor must remain

free to accept unsolicited orders from customers of the territory of other distributors, but he may not provoke such orders actively.

This kind of compromise, which aims at ensuring a limited protection to exclusive distributors, is not at all respected when a distributor sells through internet, since this type of promotion **is by far more effective in reaching customers outside the contractual territory**. The formalistic view that sales through internet are by their own nature «passive» is in contradiction with reality and should be reconsidered.

In particular, the principle that a promotion through internet that may reach customers of other territories, together with those of the territory, does not amount to an active sale, is not acceptable in general terms. The supplier should have the right to prohibit any promotion through internet which reaches at the same time customers in the territory and outside the territory, whenever alternative solutions (which would reach only the distributor's customers) are possible.

For instance, suppliers should be entitled to prohibit their distributors, as amounting to active sales, forms of promotion via internet like the use of a language which is known by a small minority of people in the territory, or other means which show the intent to reach customers outside the contractual territory.

4. FREEDOM OF ACTIVE SALES TO NON EXCLUSIVE TERRITORIES

According to Article 4 of the VBER the restriction of **active sales can be imposed upon a distributor only** with respect to the **exclusive territory** or to an exclusive customer group **reserved to the supplier or allocated** by the supplier **to another buyer.** This means that the supplier cannot protect non-exclusive territories from possible aggressive promotion by his distributors.

Leaving aside the problem whether this theoretical issue is acceptable from a commercial point of view, we would like to underline some problems which arise with its practical implementation.

4.1 Does the notion of **exclusive territory** include the situations hereunder?

- Territory with more than one exclusive distributor
- Sole distributor (supplier reserves the right to direct sales)
- *De facto* exclusive distributor (without contract)

4.2 What means **territory exclusively reserved to the supplier with respect to the situations hereunder?**

- The supplier distributes directly through a subsidiary
- The supplier sells directly to end-users
- The supplier sells to the market (including local distributors), without having an exclusive importer
- The supplier sells through an exclusive agent appointed for the territory

3.3 Is there an obligation to **expressly mention non-exclusive territories,** or is it sufficient to include the following clause?

«The Distributor agrees not to actively promote sales (e.g. through advertising, or by establishing branches or distribution depots) into the territories reserved by the Supplier exclusively for himself or allocated by the Supplier to other exclusive distributors or buyers.»

5. SELECTIVE DISTRIBUTION AND SALES TO NON EXCLUSIVE TERRITORIES

According to Article 4(b)(iii) of the VBER the prohibition to sell to non-authorized distributors, which may be imposed to the members of a selective distribution network, is only valid for countries "reserved by the supplier to operate that system".

This means that, whenever the network does not cover the whole EU territory, members of the network are free to sell the contractual products to third parties in countries not covered, which may resell them wherever.

This solution is irrational and forces companies to have recourse to impossible or ambiguous solutions, such as:

- to cover all the territories of the EU,
- to reserve territories to the supplier for future developments, or
- to draft a clause which does not specify the limitation to territories covered by the network

We think that it should be preferable to get back to the provision provided in Reg. 2790/1999, which did not include such specification.

6. THE ROLE OF EXCLUSIVE DISTRIBUTORS WITHIN SELECTIVE DISTRIBUTION NETWORKS

A commonly used solution within selective distribution consists in appointing exclusive distributors at the wholesale level who supply the retailers of the selective network. In several cases the exclusive distributor appointed for a certain territory will develop the selective distribution network within his territory (like a master franchisee); the contracts with the retailers will normally be concluded by the exclusive distributor in the name of the supplier.

This kind of organisation in particularly interesting for SMEs who do not have the resources for establishing on their own a network covering the whole EU. Of course, such solution implies the recourse to distributors for different territories, and their obligation not to actively promote sales into the territories of other distributors.

However, this type of organisation conflicts with the provision of Article 4 (d) allowing cross supplies within the networks at all levels, if we consider the distributor operating at the wholesale level as a member of the selective distribution network (but this seems difficult to sustain, since Article 1.1(e) VBER expressly refers to a network of distributors **selected on the basis of specified criteria**, which criteria do not apply to wholesalers who are simply distributors appointed for the sale to the retailers which belong to the network.

In fact, the exclusive distributor must be protected against active sales by his "colleagues" of other territories: he manages a selective distribution network, but he is not actually a selective

distributor. Therefore, in our view a preferable solution should be to allow the application to such wholesale exclusive distributors/masters the same type of restrictions to active (and passive) sales provided for exclusive distributors (currently as per Art. 4. b), i) of VBER).

Within this type of organization the retailers should be free to sell to final users wherever (see § 9.2.6, hereunder), but the wholesalers should be prevented from active sales to the retailers of the territory granted to other wholesalers.

7. THE NEED TO REGULATE ONLINE SALES BY MEMBERS OF THE NETWORK

With the development of internet in recent years, a distributor can reach much more easily, from his place of establishment, end customers wherever in the EU. This implies that **suppliers need to protect their network from excessive intra-brand competition** by trying to limit access to internet by retailers and to defend their image against forms of promotion that may negatively affect their brand.

In this context certain limitations imposed upon members of the network, regarding for instance, access to third-party platforms, use of AdWords, price comparison tools, etc., should be evaluated **case by case,** considering their actual impact on competition, excluding their inclusion in the hardcore clauses of Art. 4, VBER.

A crucial issue is still that of RPM. Retailers can develop through internet very aggressive forms of price competition, which may substantially affect the functioning of the network. The simple fact of advertising too aggressive prices may disrupt the network and put the members of the network where they must sell at a price level which is not sustainable. We have heard about cases where distributors have terminated contracts with suppliers for this reason.

Suppliers should have the possibility to intervene against excessive forms of price competition on the internet, e.g. through MAP clauses.

8. PROVIDING SPECIFIC RULES DEALING WITH FRANCHISING AGREEMENTS

As the Court of Justice has evidenced in the *Pronuptia* case, franchising agreements deserve specific treatment under EU competition rules. Under the BER 2790/1999 and 330/2010 franchising agreements have been subject to the general rules of the BER and in particular to the special rules regarding selective distribution, for those agreements which include an obligation of the franchisees to refrain from selling to non-members of the network.

Actually, this attempt to extend the rules regarding selective distribution to franchising agreements, does not appear satisfactory.

Franchising agreements almost inevitably imply, by their very nature, a closed network, but this does not mean that it is appropriate to apply to franchising agreements the limitations provided for selective distribution agreements. The strict control of the image of the sales outlet and the obligation to comply with the specific know-how characterising the franchising network imply necessarily that the sale of goods or services **must be restricted to the members of the network.**

This is so obvious that many franchising contracts do not even contain a prohibition on selling outside the network, which is taken for granted as an obvious consequence of the system.

This is why, in our view, the **prohibition on selling to non-members of the network should be expressly exempted for franchising agreements**, without the need to respect the conditions provided in the VBER for selective distribution agreements.

Finally, the 1 year's limitation concerning the post-contractual non-compete obligation should be reconsidered with respect to the limitation made in Article 5(3)(c) to "premises and land", which should cover a **wider territory** where competition by the former franchisee might be relevant.

9. THE FIVE YEARS' LIMITATION ON NON COMPETE OBLIGATIONS OF DISTRIBUTORS

The five years' limitation provided by Art. 5., 1, a) of the VBER for the non-compete obligation should be expressly excluded for exclusive distribution agreements.

This time limit actually makes little sense within typical «integrated» distribution agreements, in the context of which the obligation not to deal with products of competitors of the supplier is an essential element of the agreement, which should have the same duration as the contract itself. It would indeed be inconsistent with the distributor's primary function, i.e. to promote the supplier's products «against» his competitors, that he could at the same time act for such competitors.

Moreover, the foreclosure effect is almost inexistent for this type of agreement - at least in normal situations - since alternative distributors are easily available.

In the past years, this provision in fact forced most suppliers to conclude distribution contracts for a limited duration of 5 years (rather than for an indefinite period of time), in order to avoid the abovementioned risk.

10. THE APPLICATION OF ARTICLE 101 TO AGENCY AGREEMENTS

In the 2010 Guidelines, the Commission recognizes the well-established principle that agency agreements in principle do not fall under the prohibition of Article 101(1), except in cases of "non-genuine" agency agreements which are closer to distribution agreements with resellers.

However, the Commission elaborated criteria distinguishing between genuine and non-genuine agency agreements on the basis of situations where the agent provides products or services directly to customers, which do not at all correspond to the great majority of "normal" agency contracts. In fact, normally the agent transmits to the principal orders (contract proposals) and the latter delivers the goods to the final customer, is paid by the customer and pays a commission to the agent.

The Guidelines set out (at § 16) a list of distinctive criteria under which many "normal" agency agreements would be considered as non-genuine, such as for instance: the purchase by the

agent of a stock of spare parts; *star del credere;* assumption of advertising costs; setting up of a show-room.

Furthermore, it would be almost impossible to apply the rules regarding distribution agreements (with resellers) to "normal" agents who do not deliver the goods and cash the price.

In order to avoid these problems, it might be appropriate to make clear in the future guidelines that the problem of "non-genuine" agreements and the applicability of art. 101 to "genuine" agreements with respect to non-competition clauses, mainly refers to those agreements where the agent actually delivers goods to the customer and receives the price on behalf of the principal: see, for instance sale of petrol (*Cepsa*), sale of travel packages (case *Vlaamse Reisbureaus*), or cars (*Mercedes* case).

11. THE RULES APPLICABLE TO INTERNET PLATFORMS

Internet platforms are now the biggest players, which benefit from the application of competition rules and principles which are not consistent with their actual position in the globalized world (they certainly cannot be regarded as commercial agents and they are not in the position of a typical distributor, not even when they act as "distribution platform" (following the distinction between "supplier platform" and "distribution platform" mentioned by the NCA's in their contributions).

As also pointed out by the NCAs and by other stakeholders, new rules should be envisaged, in order to put such new players in a correct and proper position.

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